

(23,759)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 202.

THE SOUTHERN PACIFIC COMPANY, APPELLANT,

*vs.*

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 I. *Petition and Exhibits.*

Filed August 18, 1903.

United States Court of Claims, Washington, D. C.

No. 23701.

THE SOUTHERN PACIFIC COMPANY, Claimant,  
vs.  
THE UNITED STATES OF AMERICA, Respondent.

*Petition.*

To the Honorable the United States Court of Claims:

The petition of the Southern Pacific Company, a corporation,  
etc., humbly showing—

## I.

That your petitioner is, and at the time hereinafter mentioned was, a corporation duly created and existing by virtue of certain statutes of the State of Kentucky, viz: Chapter 403 of the Acts of the General Assembly of said State for 1884, approved March 17, 1884, and Chapter 601 of 1888, approved March 21, 1888, and under said Acts and with full authority so to do, petitioner was and is an Acting Corporation engaged in the operating of the lines of railroad hereinafter named, as a common carrier, in the States and Territories named, especially a line of railroad from the City of  
2 San Francisco to Ogden, Utah, via the Town of Roseville Junction, California, formerly owned by the Central Pacific Railroad Company, but since July, 1899, owned by the Central Pacific Railway Company and a line of railroad from said Roseville Junction to Portland, Oregon. From Roseville Junction to the state line between California and Oregon, the line was formerly owned by the Central Pacific Railroad Company, but is and has been since July, 1899, owned by the Central Pacific Railway Company; from said State line to Portland, Oregon, the line is owned by the Oregon and California Railroad Company, but the entire line from San Francisco to Portland was and is operated by petitioner as lessee from the owners.

## II.

By the Act of Congress of July 1, 1862, and amendatory Acts, under which the Central Pacific Railroad was constructed and its lines from Ogden to San Francisco operated, it was provided that the United States Government should at all times have the use of said road at fair and reasonable rates of compensation not to exceed the amount paid by private parties for the same kind of service.

By Section 5 of the Act of Congress, approved July 25, 1866, under which Act the line of road from Roseville Junction to Portland was constructed and has been and is operated, it was provided, among other things, that the property or troops of the United States should be transported over the railroads thereby authorized to be constructed, at the cost, charge and expense of the corporation or companies owning or operating the same when so required by the Government of the United States.

Under these provisions of law, the services below referred to have been performed by petitioner for the United States.

### III.

3 In addition to the obligations named in paragraph 11 petitioner has at said times operated said lines of railroad, in connection with other lines also, under its control, and has established rates of fares and freights from all points on its lines to all other points thereon both "through" rates and "local" rates. In many cases, especially from and to seaboard and other competitive points, the "through" rates so established are much lower than the aggregate of the local rates over such line.

That all the rates of charges, both through and local, are and were fair and reasonable, and were duly published to the public, and as to the service named below were the same to the Government as those charged to individuals for like service.

### IV.

That petitioner has, from time to time during the period from August 1, 1897, to March 2, 1902, and at the times set forth in the schedule attached to this petition and made part of it, on proper requisition of the proper Departmental officers of the Government of the United States, transported for the United States large numbers of persons and large quantities of goods over the said line of railroad via Roseville Junction from points on either side of Roseville Junction to points on the other.

### V.

Upon performance of such services petitioner has duly presented its claims for the legal compensation to which it was entitled therefor, with the proper and necessary vouchers to the several officers of the United States whose duty it was to transmit the same to the Treasury Department of the United States for further action and payment.

### VI.

4 That while petitioner was justly and lawfully entitled to the several amounts claimed as compensation for the transportation services so performed by it, as shown by said schedule, the said officers of the United States and the Department of the Treasury erroneously and unlawfully, as hereinafter stated, de-

ducted therefrom certain amounts, as shown and have duly authorized the payment of and paid to petitioner the smaller sums so determined by them to be due petitioner as hereafter stated.

That none of the said deductions were consented to by petitioner, but it protested against such deductions, and received the smaller amounts under such objection and protest.

## VII.

As stated, petitioner has upon proper requisition of proper officials of the Government of the United States, within the dates named, transported large numbers of persons and quantities of goods from stations on lines of railroad operated by it, other than the line from Roseville Junction to Portland, to said Portland, and from stations on said last named line, to stations upon other lines of railroad operated by it, between which points of commencement and destination of the transportation so performed, there were at the time, through rates of fare and freight, charged to private persons, fixed in accordance with law, and which rates were lower, in proportion to distance between said points than the sum of the local rates upon said lines of railroad.

All the items of service shown on said schedule are for transportation by way of Roseville Junction.

No compensation has been claimed by petitioner for service of transportation upon said line between Roseville Junction and Portland, but upon all other lines operated as aforesaid by petitioner, and over which lines part of the transportation so furnished was performed, petitioner claimed and still claims, that the United States was chargeable with compensation at fair and reasonable rates, not exceeding those charged to private persons for like service,

5 viz: the local rate from the point of shipment to Roseville Junction, or from Roseville Junction to the point of destination, as the direction of carriage might be,—and free transportation over the whole or part of the Roseville-Portland line.

That the said officers of the Government of the United States insisted that, although no charge could properly be made for services north of Roseville Junction, the Government was entitled to reduce the charges between Roseville Junction and the point of shipment or destination to a figure based upon the actual mileage between said points, based upon the lower "through" rates.

That is to say, petitioner claimed the proper charge to be free transportation on the Roseville-Portland line, and the local rate over its outside line.

The Government claims that the rate must be a mileage rate between the points of transportation, based on the "through" rate, and payment of such rate only on the outside line, and no charge for the Roseville-Portland portion.

To make this fully understood, as this is the point of the controversy, petitioner avers that Portland has sea and river communication with San Francisco, and rates of transportation between the cities are controlled by water competition, and are very much lower than a reasonable all rail route would be.

Roseville Junction is an interior Town. Rates to and from San Francisco, and all other inland points are made upon a basis of reasonable all rail rates, so that the rate per ton per mile is less from San Francisco to Portland, than from San Francisco to Roseville Junction.

From San Francisco to Roseville Junction is about 108 miles; Roseville Junction to Portland is about 771 miles.

In shipment from San Francisco to Portland, petitioner charges the local rate for the 108 miles only.

The Government officials claim that the charge should be (in mileage stated) 108/879 of the through rate, which, as  
6 stated, is largely less than the local rate to Roseville Junction, and has made the deductions shown on schedule herein on that principle.

Because the items are so numerous, and, if separately stated with circumstances as to each, would make this petition so voluminous as to be unwieldy, petitioner affixes the schedule named, to be regarded as part hereof, all in tabular form.

In 1st column are dates of services rendered.

In 2nd column, the Bureau or Department to which they were furnished.

In 3rd and 4th columns, the points between which the transportation was performed.

In 5th column, character of service.

In 6th and 7th columns, date and No. of claimant's bills.

In 8th, 9th and 10th columns, the totals of said bills, upon petitioner's basis.

In 11th to 15th inclusive, the allowance by Government Officials.

In 16th, 17th and 18th columns, the deductions made—the 18th showing total deduction.

In 19th to 21st, inclusive, the data of Treasury Warrants for allowed amount.

In 22nd column, dates of Comptroller's certificates.

All the deductions shown in said schedule were arrived at by the officers of the United States upon the basis as stated.

The total deductions so made are \$25,632.06, of which \$3,712.95 should be credited on account of the debt of the Central Pacific Railroad Company and the remainder \$21,919.11 should be paid in cash to petitioner which it is entitled to recover herein as it believes.

Petitioner says it is the sole owner of the claims so set forth, and that no assignment or transfer of the same has been made; that it is justly entitled to the full amount as claimed, after allowing all just credits and set offs; that it has not, nor have any of its stockholders, in any way voluntarily aided, abetted or given encouragement to rebellion against the Government and that it believes  
7-17 the facts as stated in this petition to be true.

Wherefore it prays for judgment against the United States of America for the sum of Twenty-one-thousand nine hundred and nineteen 11/100 dollars (\$21,919.11) and the further sum of Three thousand seven hundred and twelve 95/100 dollars (\$3,712.95) to be applied as by said schedule, in all the sum of Twenty-five thousand six hundred and thirty-two 06/100 dollars, (\$25,632.06), as

shown thereby, and for such other and further relief as to the Court shall seem proper and justice shall demand.

[CORPORATE SEAL.] SOUTHERN PACIFIC COMPANY,  
By JOSEPH HELLEN,  
*Assistant Secretary.*

STATE OF NEW YORK,  
*County of New York,*  
*Southern District of New York, ss:*

Joseph Hellen, being duly sworn deposes and says that he is the Assistant Secretary of said Southern Pacific Company; that he has read the above petition, and knows its contents, and that the facts therein stated are true to the best of his knowledge and belief; that he executed this petition by authority of said Company, and the seal annexed is its corporate seal.

JOSEPH HELLEN.

Subscribed and sworn to before me this 14th day of August, A. D. 1903.

WALTER H. SMITH,  
*Notary Public for New York County.*

\* \* \* \* \*

18 II. *Traverse.*

Filed February 18, 1913.

In the Court of Claims of the United States, December Term, A. D. 1912.

No. 23701.

THE SOUTHERN PACIFIC Co.

VS.

THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,  
*Assistant Attorney General.*

19 III. *Argument and Submission of Case.*

On the 18th day of February, 1913, this case came on to be heard. Mr. A. A. Hoebling, Jr., was heard for the claimant; Mr. Thurlow M. Gordon was heard for the defendants and the case was submitted.

IV. *Findings of Fact and Conclusion of Law.*

Filed March 24, 1913.

SOUTHERN PACIFIC COMPANY

V.

THE UNITED STATES.

This case having been heard by the Court of Claims the court, on the evidence, makes the following

*Findings of Fact.*

## I.

The claimant, the Southern Pacific Company, is a corporation, duly created, organized, and existing under and by virtue of the laws of the State of Kentucky, and was such corporation at the several times of performing all the services embraced in this suit; and now is, and doing all the times hereinafter mentioned was, engaged as a common carrier, of both passengers and freight, in operating, as lessee, the line of railroad from San Francisco, California, to Ogden, Utah, via Roseville Junction, California; that part of the line from San Francisco to Sacramento being owned by the Southern Pacific Railroad Company, of California, and the remaining part of said line from Sacramento to Ogden having been formerly owned by the Central Pacific Railroad Company, but since July, 1899, owned by the Central Pacific Railway Company; and also operating, as lessee, the line of railroad from said Roseville Junction to the State line between California and Oregon, said line having been formerly owned by said Central Pacific Railroad Company, under consolidation between that company and the California and Oregon Railroad Company, but since July, 1899, owned by said Central Pacific Railway Company; and, in connection with said last-named line, from said California-Oregon State line to Portland, Oregon, the latter line being likewise operated by claimant as lessee of the Oregon and California Railroad Company, owner (R., 63, 64, 69).

## II.

By section six (6) of act of Congress approved July 1, 1862 (12 Stats., 489), and amendatory acts, under which said Central Pacific Railroad was constructed, and the line of road from San Francisco to Ogden operated, it was provided that the United States should, at all times have the use of said road, at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service.

21 By section five (5) of act of Congress approved July 25, 1866, under which the line of road from Roseville Junction to Portland was constructed, and has been and is operated, it was

provided that the property and troops of the United States should be transported free of charge to the United States, and at the cost, charge, and expense of the corporation owning or operating said line of road from Roseville Junction to Portland, when so thereunto required by the Government of the United States (14 Stats., 239).

Under the above provisions of law, the services for which claim is made herein were performed and rendered by claimant to and for the United States.

### III.

Claimant during all the times embraced in this suit (August, 1897, to March, 1902) operated as lessee, as aforesaid, said several lines of railroad from, to, and between the points herein-above named; and it duly and lawfully established, published, and promulgated rates of fare for persons and rates of freight for property, both "local" and "through," from all points on its said lines to all other points thereon.

### IV.

The distance from San Francisco to Roseville is 108.03 miles (R., 32, 63; and during all the times embraced herein the lawfully established "local" first-class freight rate between said points was 26 cents per hundred pounds; which rate was low, the same being compelled by water competition—commonly called a compelled rate.

The distance from Roseville Junction to Portland is 663.91 miles (being 293.58 miles from Roseville Junction to California-Oregon State line, and 367.33 miles from said State line to Portland); and the lawfully established "through" first-class freight rate from San Francisco to Portland, during all the times aforesaid, was 51 cents per hundred pounds; which rate was also low, the same being compelled by water competition. The above rates are reasonable.

The distance from San Francisco to Portland is 771.94 miles.

### V.

The established "through" rates between the points aforesaid, as well as from and to seaboard and other competitive points, were less than the aggregate of the established "local" rates; and all said rates, both "through" and "local," were the same to the United States as to individuals for like service.

### VI.

The claimant, between August, 1897, and March, 1902, and at and upon the several and respective dates set forth in the schedule attached to the petition herein, on due requisition by the proper officers of defendant, transported for the United States persons and property, as therein stated, over said lines of railroad, via Roseville Junction, from points on either side thereof to points on the other



side; thus, from San Francisco, Ogden, and other points, as indicated in said schedule, to Portland via Roseville Junction.

22 The shipments in question did not originate at Roseville Junction nor terminate at Roseville Junction, but were carried through on one continuous transit over both the free haul and the nonfree haul portions of the road precisely as any through shipment is carried for a private shipper.

## VII.

Upon performance of such several and respective services, claimant presented to the proper accounting officers of defendant, for allowance and payment, its several bills for such services, based upon the "local" rate to Roseville Junction and free haul beyond that point north to Portland; said several bills aggregating the sum of \$56,259.20 and being the amount claimed by it as compensation for the services so rendered.

## VIII.

Defendant, however, would and did not allow and pay claimant for said services upon the basis contended for by it, as aforesaid; but would and did only allow claimant compensation based on a mileage proportion of the "through" rate, San Francisco to Portland, and payment of such mileage proportion between Roseville Junction and points south, with no allowance (being free haul) for the Roseville Junction-Portland mileage; in other words, the mileage proportion of the amount which the Government would be obliged to pay for the entire service if not entitled to the free service, thus resulting in payments by defendant to claimant for the services so rendered, as herein aforesaid, aggregating \$30,627.26, and deductions aggregating \$25,632.06, made by defendant from the bills so presented by claimant, said deductions representing the differences in amount between said two methods of computing the compensation for the services rendered; with the exception of \$1,652.06 of said deductions, which latter were based, either in whole or part, upon reasons other than the mere matter of method of computing the charge, as above, and, therefore, said last-named amount is deducted (and conceded by claimant for the purposes of this suit only) from the aggregate deductions set forth and found herein (Finding XIII post).

## IX.

Under the measure of compensation contended for by claimant herein, it would be entitled to receive said "local" rate of 26 cents per hundred pounds for the transportation of freight for defendant between San Francisco and Roseville Junction.

Under the measure of compensation insisted upon and applied by defendant between the points named, claimant would only be entitled to receive (in round numbers) 108/772ds of said lower (com-



pelled) "through" rate of 51 cents per hundred pounds, San Francisco to Portland, or (in round numbers) 7.14 cents per hundred pounds for the haul from San Francisco to Roseville Junction, instead of said "local" rate of 26 cents per hundred pounds between said points.

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## X.

The same method of computing the compensation of claimant was likewise applied and used by defendant in respect of adjusting its accounts for passenger transportation, via Roseville Junction, covering the items set forth in detail in the schedules attached to the petition herein, namely, a mileage prorate of the entire "through" fare; thus for the transportation of a passenger for defendant, San Francisco to Portland, the "local" fare to Roseville Junction was \$3.05, the remainder of the transportation being "free-haul;" but defendant only allowed and paid claimant therefor the mileage prorate of the "through" fare of \$20, namely, \$2.80.

## XI.

Claimant has not, in any manner or way, assented to or acquiesced in the certain reduced compensation aforesaid; but, on the contrary, has at all times objected to settlement of these accounts on the basis used by the Government in that behalf and has repeatedly protested against the same to defendant, but without avail, and the several amounts set forth herein and claimed by claimant have not been paid by defendant, nor any part thereof.

## XII.

Claimant is the sole owner of the claims sued on herein and has made no transfer or assignment thereof.

## XIII.

The aggregate amount of deduction made by defendant, in respect of the services so rendered by claimant, by reason of the allowance and payment of a mileage proportion of the "through" rate, instead of allowance and payment of the "local" rate to or from Roseville Junction and points on the south, is the full sum of \$23,980 (eliminating from the amounts claimed in the schedule attached to the petition certain items of deduction based in whole or in part upon reasons other than the mere basis of computing compensation to and from Roseville Junction, as above, the same amounting to the sum of \$1,652.06 made up as follows: War Department settlements, \$742.67; Interior Department settlements, \$899.39; and Agricultural Department settlement, \$10).

## XIV.

The mileage basis of division has been adopted from the beginning by the highest administrative officials of the Government, and consistently adhered to. The mileage basis of division is one of the methods adopted by all railroads in the case of transportation partly over nonland grant and partly over 50 per cent land-grant lines. Where the connecting lines are owned by separate corporations, the division of through rates is a subject of negotiations between them. They are usually divided upon an agreed commercial per cent on mileage pro rata basis, in accord with relative cost of transportation.

24

## XV.

The practice of issuing two bills of lading, one over the free haul and one over the nonfree-haul portion of the line, was adopted merely for convenience in accounting and had nothing to do with the "through" character of the haul. A continuous unbroken transit, without even the form of retaking possession by the Government at Roseville Junction, was contemplated by both parties, and in fact existed.

*Conclusion of Law.*

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petition be and the same is hereby dismissed.

V. *Opinion.*

BOOTH, J., delivered the opinion of the court.

The Southern Pacific Company operates as lessee a railroad line from San Francisco, Cal., via Roseville Junction, Cal., to Portland, Oreg., the complete distance between the termini being 771.49 miles. From San Francisco, Cal., to Roseville Junction it is 108.03 miles, leaving 663.46 miles between Roseville Junction and Portland, Oreg. The road from Roseville Junction to Portland is what is known as a free-haul road, having been originally constructed under the act of July 25, 1866 (14 Stat. L., 239), whereby in consideration of Government aid Government property and troops were to be transported free of charge. The line from Roseville to San Francisco is part of the main line extending from San Francisco to Ogden, Utah, constructed under the act of July 1, 1862 (12 Stat. L., 489), by the Central Pacific Company under Government aid, specifically agreeing that the Government should have the use of said road "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service."

From August, 1897, to March, 1902, the defendants frequently caused the transportation of both merchandise and troops over said line, paying therefor the published tariff for local transportation

and the through tariff rates for through transportation. The adjustment of the proper amount due for through transportation provokes this controversy, on all through shipments consigned to Portland from San Francisco, or vice versa. The proper accounting officers of the Government have paid the claimant company for the haul from Roseville to San Francisco upon a proportionate mileage basis; i. e., the through rate from Portland to San Francisco is 51 cents per hundred pounds, which amount divided by 108/772, relative differences in mileage, gives, in round numbers, 7.14 cents per hundred pounds. The claimant company contends that it is entitled to the published local rate of 26 cents per hundred pounds from Roseville to San Francisco, which it asserts is just and reasonable and paid by all other shippers. There is but the one issue in the case and that is the proper rate to be applied on through shipments from Roseville Junction to San Francisco. Claimant company concedes that the through rate of 51 cents per hundred pounds would be applicable in this case if the shipment concerned private parties

25 alone; the alleged distinction as against the defendants is predicated upon the difference in the statutory provisions affecting the Government's rights as to free transportation on one line of road and pay transportation on the other. If the case involved diverse ownership of connecting lines the record fully establishes the fact that a through rate would be established and published by mutual negotiations dependent for its proper division upon the relative cost of the transportation over each line, taking into consideration the general contour of the territory traversed and other details of expense. If physical conditions are similar and the cost of transportation approximately equal over each line the rate is divided upon what is commonly called a mileage prorata basis, the exact method employed by the Government in this case. Of course the identity of ownership in this case precluded the above arrangements, and it is readily discernible that the case is exceedingly important because applicable to similar cases involving large amounts and almost daily accountings.

In the case of the Atchison, Topeka & Santa Fe R. R. Co. v. United States (15 C. Cls., 126) the court held that "through service is to be computed at through rates, local at local rates." The act of July 25, 1866 (*supra*), under which the line from Roseville Junction to San Francisco was constructed, by its express terms put the defendants as respects rate for transportation of property upon exactly the same basis as a private shipper. Their rights were no more and no less; while the transportation service from Portland to Roseville was commonly designated "a free haul" it was not so in fact; it was not gratuitous. As well said in defendants' brief, "it had been paid in advance," for the large grant of public lands was at least considered a full and complete consideration for the privilege. To say that because the defendants were compelled to pay freight on the short haul from Roseville to San Francisco converted the shipment from through transportation to local is to overlook the fact that the defendants were not exempt from payment of freight for a through shipment. It had been previously paid over one line

of railroad and they therefore became under the law entitled to all the rights of a private shipper transporting property over the entire route. The only question possibly involved is the proper division of the through rate. It is difficult to perceive how the local rate from Roseville Junction to San Francisco is at all applicable, for it must be conceded that if a private shipment only was involved no more than 51 cents per hundred pounds would have been exacted.

The method adopted by the accounting officers in the settlement of this case has been uniform and long continued. The railroads with very few exceptions have acquiesced in its justness and accepted payments in accordance therewith.

The Comptroller of the Treasury in a very exhaustive opinion covering the entire subject, found in 8 Comp. Dec., p. 598, held adversely to claimant's contention. The opinion cites and analyses the *the* various decisions upon the subject and so completely covers the entire controversy that we cite it with our entire approval.

The petition is dismissed. It is so ordered.

26

VI. *Judgment Dismissing Petition.*

No. 23701.

SOUTHERN PACIFIC COMPANY

VS.

THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 24th day of March, 1913, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of the claimant, Southern Pacific Company, be, and the same is hereby dismissed.

BY THE COURT.

27

VII. *Application for, and Allowance of, Appeal.*

Comes now the above named Southern Pacific Company, by its attorney, and prays the Court to allow an appeal to the Supreme Court of the United States, from the certain judgment entered herein March 24, 1913, dismissing the petition of claimant.

CHARLES H. BATES,

*Attorney of Record for Claimant.*

A. A. HOEHLING, JR.,

*Of Counsel.*

Filed June 10, 1913.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

June 16, 1913.

28

In the Court of Claims.

No. 23701.

SOUTHERN PACIFIC COMPANY

vs.

THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the opinion of the Court; of the final judgment of the Court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 19 day of June, 1913.

[Seal Court of Claims.]

JOHN RANDOLPH,  
*Ass't Clerk Court of Claims.*

29

Supreme Court of the United States, October Term, 1913.

No. 608.

SOUTHERN PACIFIC COMPANY, Appellant,

versus

THE UNITED STATES.

*Assignment of Errors.*

The Southern Pacific Company, appellant, hereby specifies the following errors of the Court below upon which it intends to rely herein:

1. In holding that a mileage proportion of a "through" rate, between given terminal points, is the proper basis of compensation to appellant company, for transportation and carriage by it of passengers and freight for the United States, where a part of the trip, between said points, was over a "pay" line, and the remainder thereof was over a "free-haul" line.

2. In not holding that the proper basis of compensation in such case is the "local" rate over the "pay" line, and nothing over the "free-haul" line.

3. In holding that appellant is not entitled to recover upon the basis of the "local" rate for the services rendered by it to the United States covering so much of the haul as was over the "pay" line.

4. In failing to enter judgment for appellant in the sum of \$23,980, being the difference between compensation computed on the basis of the "local" rate on the "pay" line, and the amount actually paid appellant, computed on the basis of a mileage proportion of the through rate covering the entire distance.

5. In dismissing the petition of appellant, and in entering judgment in favor of appellee.

Appellant hereby designates the following parts of the record to be printed, and those to be omitted from the printing:

30 Print all of the transcript of the record as filed herein, with the exception of the Schedule, contained on pages 8 to 17, (both inclusive,) of said transcript; and which Schedule sets forth figures and amounts in detail, the aggregate amount whereof is correctly found by the Court below; thus entirely superseding the necessity for reference to or consideration of the individual items set forth in said Schedule.

MAXWELL EVARTS,  
*Attorney for Appellant.*

Washington, D. C., June 24, 1913.

WASHINGTON, D. C., July 18, 1913.

Receipt of copy of the foregoing is hereby acknowledged.

J. C. McREYNOLDS,  
*Attorney General of the United States.*  
H.

31 [Endorsed:] 608/23759. No. 608. Oct. Term, 1913. Supreme Court of the United States. Southern Pacific Company, Appellant, versus The United States. Specification of Errors and designation of portions of record to be printed, &c., and acknowledgment of service of copy. The Clerk will please file. Maxwell Evarts, Att'y for Appellant.

32 [Endorsed:] File No. 23,759. Supreme Court U. S., October term, 1913. Term No. 608. Southern Pacific Company, Appellant, vs. The United States. Specification of errors to be relied upon and designation by counsel for appellant of parts of record to be printed, and proof of service of same. Filed July 21, 1913.

Endorsed on cover: File No. 23,759. Court of Claims. Term No. 202. The Southern Pacific Company, appellant, vs. The United States. Filed June 20th, 1913. File No. 23,759.

Office Supreme Court, U. S.

FILED

DEC 18 1914

JAMES D. MAHER

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1914.**

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**No. 202.**

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**SOUTHERN PACIFIC COMPANY, APPELLANT,**

**vs.**

**THE UNITED STATES.**

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**ON APPEAL FROM THE COURT OF CLAIMS.**

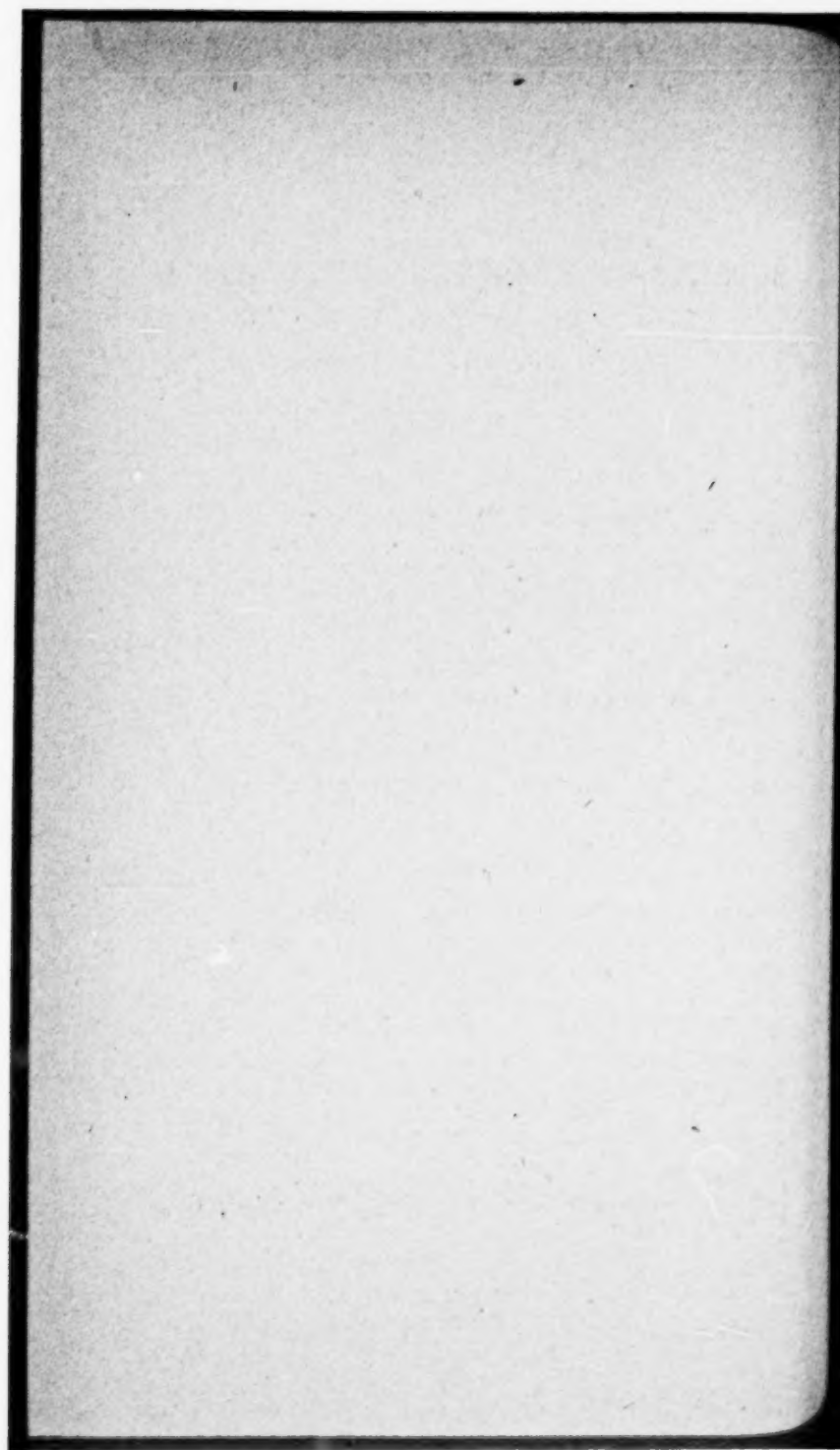
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**BRIEF FOR APPELLANT.**

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**A. A. HOEHLING, JR.,**  
*Attorney for Appellant.*







# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

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No. 202.

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SOUTHERN PACIFIC COMPANY, APPELLANT,

*vs.*

THE UNITED STATES.

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ON APPEAL FROM THE COURT OF CLAIMS.

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## BRIEF FOR APPELLANT.

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### Statement.

The Southern Pacific Company operates, as lessee, a railroad line from San Francisco, California, *via* Roseville Junction, California, to Portland, Oregon, the distance between said termini being 771.94 miles. The distance from San Francisco to Roseville Junction is 108.03 miles, and the distance from Roseville Junction to Portland is 663.91 miles. The road from Roseville Junction to Portland is what is known as "free-haul," having been originally constructed under the act of Congress, approved July 25, 1866 (14 Stat., 239), by the terms whereof Government property and troops were to be transported free of charge. The line from Rose-

ville Junction to San Francisco is part of the main line extending from San Francisco to Ogden, Utah, constructed by the Central Pacific Railroad Company under the act of Congress, approved July 1, 1862 (12 Stat., 489), by the terms of which it was specifically provided that the Government should have the use of said road "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service" (R., 6, 7).

From August 18, 1897, to March, 1902, the United States caused the transportation of both Government property and troops over said line, and from the several accounts presented by the railroad company for such service the accounting officers of the United States deducted amounts aggregating the sum of \$23,980; the latter having applied a mileage proportion of the published tariff *through* rate, notwithstanding the fact that one part of the haul was over a "free-haul" line, and the other over a nonfree-haul or "pay" line (R., 8, 9).

Appellant contended that it was entitled to the full local rate on the pay line, and, of course, nothing on the free-haul line; the United States contending, on the other hand, that it was entitled to nothing over the free-haul line (and that is conceded), but, on the nonfree-haul line, or pay line, is entitled only to a *mileage proportion* of the *through* rate, covering both portions, free-haul and pay line (R., 8).

That is the only issue in the case; there are no disputed facts, and the present appeal presents but a single question of law, and that is as to the legal rate of compensation to which the railroad company is entitled for the transportation of property and troops of the United States over a continuous line of railroad, part of which is free-haul and the remaining part of which is pay line.

The Court of Claims made its findings of fact in the case, and rendered judgment dismissing the petition; and it is from that judgment that this appeal is taken (R., 6-10).

### Assignments of Error.

1. In holding that a mileage proportion of a "through" rate, between given terminal points, is the proper basis of compensation to appellant company, for transportation and carriage by it of passengers and freight for the United States, where a part of the trip, between said points, was over a "pay line," and the remainder thereof was over a "free-haul" line.

2. In not holding that the proper basis of compensation in such case is the "local" rate over the "pay line," and nothing over the "free-haul" line.

3. In holding that appellant is not entitled to recover upon the basis of the "local" rate for the services rendered by it to the United States covering so much of the haul as was over the "pay" line.

4. In failing to enter judgment for appellant in the sum of \$23,980, being the difference between compensation computed on the basis of the "local" rate on the "pay" line, and the amount actually paid appellant, computed on the basis of a mileage proportion of the through rate covering the entire distance.

5. In dismissing the petition of appellant, and in entering judgment in favor of appellee (R., 13-14).

## BRIEF.

The line from Roseville Junction to San Francisco is part of the main line extending from San Francisco to Ogden, Utah, constructed by the Central Pacific Railroad Company under the act of Congress approved July 1, 1862 (12 Stat., 489), section 6 of which act thus provided:

"SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company \* \* \* shall at all times \* \* \* transport mails, troops and munitions of war, supplies, and public stores upon said railroad for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service)."

The above provision is applicable to the transportation involved herein covering the haul from Roseville Junction south, and is the line referred to herein as "pay" line; in other words, that part of the continuous haul for which the carrier is entitled to receive "fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service" (*supra*).

The line from Roseville Junction to Portland, Oregon, was constructed under the act of Congress approved July 25, 1866 (14 Stat., 239), section 5 of which act thus provided:

"SEC. 5. *And be it further enacted*, \* \* \* And said railroad shall be and remain a public highway for the use of the Government of the United States free of all toll or other charges upon the transportation of the property or troops of the United States: And the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States."

The provisions of that section are applicable to the transportation involved herein covering the haul from Roseville Junction *north*, and is the line referred to herein as "free-haul" line; in other words, that part of the continuous haul of property or troops of the United States required to be made and performed "at the cost, charge, and expense of the corporations or companies owning or operating the same" (*supra*).

The Southern Pacific Company, appellant herein, is the lessee of each and all of the lines above mentioned, and as such operated the same during all the times mentioned herein (R., 6).

From the above provisions of law, and as applied to the present case, the "pay" line either begins or ends at Roseville Junction, California, to or from, east or south, and the "free-haul" line begins or ends at Roseville Junction, from or to Portland, Oregon, on the north.

To illustrate the matter in its simplest form, take the case of a shipment or carriage between San Francisco, California (on the south), and Portland, Oregon (on the north), *via* Roseville Junction.

While there is a continuous rail line between those two points the line itself, from the standpoint of compensation or pay to the railroad company, *breaks* at Roseville Junction; *south* of that point it is "pay" line; *north* thereof, it is "free-haul" line; and it so happens that appellant company, as lessee, operates *both* lines.

And thus the question arises: Is appellant entitled to its full *local* rate between San Francisco and Roseville Junction, California (as claimed by it), or is it only entitled to the *mileage proportion* which the distance between those two points bears to the through haul and *through* rate, San Francisco, California, to Portland, Oregon (as insisted by the United States and as held by the Court of Claims herein)?

The distance between San Francisco and Roseville Junction, California, is 108.03 miles, and the published *local*

freight rate between those points is 26 cents per hundred weight, and \$3.05 for passenger fare.

The distance from Roseville Junction, California, to Portland, Oregon, is 633.91 miles, and, as already explained, that line is non-pay or "free-haul."

The published *through* rate, San Francisco to Portland, is 51 cents per hundred weight, and \$20 for passenger fare.

Now, instead of paying appellant company the local rates of 26 cents per hundred weight for transportation of property and \$3.05 for troops of the United States, between San Francisco and Roseville Junction, California (pay-line), the shipment or carriage being destined to Portland, Oregon, the United States allowed and paid only  $108/772$  of 51 cents (*through* freight rate, San Francisco to Portland, *supra*), or, in round numbers,  $7\frac{14}{100}$  cents per hundred weight for transportation of property, instead of 26 cents per hundred weight; and like proportion ( $108/772$ ) of \$20 (*through* passenger rate between same points), or, in round numbers, \$2.80, instead of \$3.05 for passenger fare (R., 9).

The difference between the several amounts claimed by appellant company under the *local* rate on the "pay" line and the several amounts allowed and paid by the United States under the *mileage proportion* of the *through* rate, as above explained, is the amount involved in this suit, namely, the sum of \$23,980 (R., 9).

#### THE STATUTORY CONTRACT EFFECTED BY THE ACTS OF CONGRESS OF JULY 1, 1862, AND JULY 25, 1866, SUPRA.

Under the law, as already noted, the Government is entitled to "free-haul" for 634 miles of the above distance of 772 miles; that is, between Portland and Roseville Junction; but there the free-haul stops, and, at that point, the carrier, for the distance from Roseville Junction to San Francisco, 108 miles, becomes entitled to fair and reasonable rates of

compensation, not to exceed the amount paid by private parties for the same kind of service, and that amount, as already shown, is 26 cents per hundred pounds for the transportation of property and \$3.05 for troops of the United States.

The Government, however, insists that the proper charge is a *mileage proportion* of the amount which it would have had to pay for the entire through transportation, San Francisco to Portland, had it not been entitled to free-haul on a part of the journey.

Such contention, however, if sustained, would impose upon the carrier an additional burden not contemplated or authorized by Congress, since it would result in giving to the Government the free-haul from Portland to Roseville Junction, to which it is of right entitled, but would also give to it, at the cost and expense of the railroad carrier, more than two-thirds of its lawfully established compensation for the transportation of property over the line that is not free-haul (Roseville Junction to San Francisco); that is to say, out of a lawfully established rate of 26 cents per hundred pounds it proposes to pay, and actually has paid, claimant but 7.14 cents per hundred pounds, and \$2.80, instead of \$3.05, for passenger fare.

To further analyze the contention of the Government, suppose, for example, if such a thing were now legally permissible, that an individual had a "pass" for either his person or property, Roseville Junction to Portland, and wished to purchase from the carrier transportation that, plus the pass, would convey him or his property upon a continuous trip, San Francisco to Portland *via* Roseville Junction. Is it conceivable that he could demand of the carrier a *special rate* of but 108/772 of the "through" fare or rate, San Francisco to Portland, instead of paying the straight "local" fare or rate, San Francisco to Roseville Junction, at which last-named point his "pass"—namely, his "free-haul"—commences its operation? Surely not.

The fact that the trip is continuous or through, or in the same car or train, is really without legal significance in the case stated, or in the present, because the corporate service of transportation is a divisible one, since two totally distinct, different, and separate contracts enter into the service, one a continuing one, for all time, to "free-haul" between Portland and Roseville Junction, the other an executory contract for carriage between Roseville Junction and San Francisco at fair and reasonable rates of compensation.

With the latter contract the former has no concern; its interest begins and ends with free service between the points named; nor has the latter contract any interest in the former, save only that claimant, as lessee, is legally bound to accept the "free-haul" for whatever service it renders over that line. Beyond that patrons, private parties, and Government alike are bound to accept and pay the lawfully established rates.

There is a *statutory contract* under which appellant company is required to "free-haul" Government passengers and freight between Portland and Roseville Junction, and there is another entirely separate and distinct *statutory contract*, under which the Government is required to pay appellant company fair and reasonable rates of compensation for the haul between Roseville Junction and San Francisco not to exceed the amount paid by private parties for like service.

The Government, however, now seeks to justify, as compensation for this last haul, an amount considerably less than the sum that is paid by private parties for the same service, thus in necessary result imposing upon the carrier an *additional burden* neither warranted nor authorized by law.

As to the distance embraced in the "free-haul," the Government possesses and enjoys an exclusive privilege not permitted to private parties; but as to the distance not embraced in the "free-haul" line the Government stands under the law on precisely the same footing as an individual or private party.



The contention herein of the carrier is that the position assumed by the Government is one that would enable it, on the one hand, to appropriate to itself additional privileges and benefits neither intended nor authorized by the certain statutory contract effected by the act of Congress of July 25, 1866, *supra*, and, on the other hand, deprive the carrier of the privileges and benefits secured to it by the certain act of Congress of July 1, 1862, *supra*. This, it is submitted, cannot lawfully be done; and it matters not that the carrier happens to be operating both of the railroad lines that form the subject-matter of the two certain acts of Congress mentioned. That is a mere coincidence that should not be permitted either to enlarge or diminish the rights of the Government and carrier, respectively, so defined by those acts.

In this connection the case of *The Western Maryland Railroad Co. vs. Lynch* (82 Md., 233) is instructive: there Lynch and the railroad company in 1871 entered into a written contract, by the terms of which Lynch agreed to permit the railroad company to pipe water across his lands to a tank on the edge of the railroad tracks near the city of Westminster, Maryland; also to go upon his lands to make necessary repairs to the pipe line; and the railroad company covenanted that Lynch, his heirs and assigns, should be entitled forever thereafter to ride *without charge* upon the trains of the company and of its successors and assigns, only one such person, however, to be permitted so to ride free of charge, the company agreeing to issue passes from time to time to evidence the right of such free use of its trains.

At the time that contract was made the railroad company, under its charter, was only authorized to construct and operate a railroad in the State of Maryland between Baltimore and Williamsport. Thereafter various extensions of its charter were granted, so that at the time of the controversy in that case (1888), seventeen years after the contract was entered into, the Western Maryland Railroad Company, either as owner or lessee, operated its trains through the

State of Maryland to divers points in the State of Pennsylvania, and it was accordingly contended by Lynch that the above contract entitled him to a free pass over *the entire line of railroad as so extended*. The court, however, rejected the claim, stating:

“When a contract is made about an interest distinctly and specifically identified, it would require very extraordinary circumstances to justify a construction which should apply it to another and different object. Whatever may possibly arise in the infinite variety and complexity of human affairs, it is very safe to say that nothing of this kind exists in the present case. It is nothing to the purpose that the railroad has acquired the corporate capacity to have more extended tracks than it had at the time of the contract. The contract was for what it could then give; and not for what it might in the future acquire the power to give. Suppose in the course of events it should extend its tracks to California, would it be argued that it was bound to furnish to Lynch transportation the whole distance?”

It was contended below on behalf of the Government, and doubtless the same contention will be repeated in this court, that there is a lawfully established through rate from San Francisco to Portland, and that the Government is entitled to the benefit of the through rate, where such rate exists, just as would be the case as to a private shipper between the terminal points named, and that the Government really stands in the position of a private shipper who has paid his freight charges *in advance* as to a portion of the journey; meaning thereby the grant of lands contained in said act of July 25, 1863, *supra*.

In reply to that contention, it may be said, in the first place, that it is not accurate to ascribe to the Government the position of one who has prepaid its freight charges for all time by means of a land grant. The land grant was an element in the statutory agreement between Congress and

the grantee railroad company, and doubtless in part a consideration for the promised free-haul, for all time, of property and troops of the United States, but it is a matter of public history as well as common knowledge that the Government itself received a very substantial consideration for the land grants made by it, in the opening, settlement, and development of the vacant public lands of the United States brought about by railroad construction and operation. That undoubtedly was a prime factor in the endeavor of the Government to induce persons or corporations to undertake the vast project of railroad construction across the then undeveloped and unsettled public domain. To encourage and induce parties to undertake this vast work, Congress offered land grants, from the proceeds of which, it was assumed, that financial assistance would result to aid in the railroad construction. Furthermore, the Government reserved to itself the intervening even-numbered sections, and the value of those reserved sections was, naturally, very greatly enhanced by the railroad construction.

While, as to the Roseville Junction-Portland line, the railroad was made to be a public highway for the use of the Government, free of all toll or other charges upon the transportation of the property or troops of the United States, it would be exceedingly difficult, if not practically impossible, to figure these land grants as a *prepayment*, for all time, for the transportation of Government property and troops, as so contended below on behalf of the United States.

Thus, suppose the grant to have been one of a million acres, and giving to the granted land a value of \$1.25 per acre, such contention of the Government would start with an assumed *prepayment* by it of one and a quarter million dollars. The initial shipment of Government freight would reduce the assumed prepayment account, and as the railroad line has been in operation for some thirty years or more, it is quite evident that the assumed prepayment account may already very readily be assumed to have become more than exhausted.

It would seem practically impossible to dispose of this case under the theory of a prepayment of freight charges by means of a land grant, even were the application of such theory possible, but which, it is submitted, it is not; and, furthermore, the application of any such theory is not legally permissible, and this for the reason that tariff rates are based upon a *money* charge; and free passes in settlement of damage claims, newspaper advertisements, or in payment of railroad rights of way, etc., find no place in the tariffs authorized and required by law.

Thus, in the case of Louisville & Nashville R. R. Co. *vs.* Mottley (219 U. S., 467, 476-7), the railroad company, in 1871, had compromised a damage claim for personal injuries received by Mottley and his wife in a railroad collision by agreeing to give to each of them a free pass annually for their respective lives. The railroad company kept and performed the agreement during the years until the passage by Congress of the act of June 29, 1906 (amendatory of the Act to Regulate Commerce, approved February 4, 1887), which made such free passes illegal. Thereupon, Mottley and wife brought suit against the railroad company to specifically execute the agreement, by issuing passes to plaintiffs for the year 1909, and for every year thereafter, so long as they should live.

In the opinion of this court in that case the following is stated:

"In our opinion, after the passage of the commerce act the railroad company could not lawfully accept from Mottley and wife any compensation 'different' *in kind* from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. They could not be paid in any other way, without producing the utmost confusion and defeating the policy established by the acts regulating commerce. The evident purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know what the rates

were as well as to have the equal benefit of them. To that end the carrier was required to print, post, and file its schedule and to keep them open to public inspection. No change could be made in the rates embraced by the schedules except upon notice to the Commission and to the public. But an examination of the schedules would be of no avail and would not ordinarily be of any practical value if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds, and of such value as the parties immediately concerned chose to put upon it, in place of money for the services performed by the carrier.

"That money only was receivable for transportation is the basis upon which the Interstate Commerce Commission has proceeded; for, in one of its conference rulings (207) issued in 1909, the Commission held that nothing but money could be lawfully received or accepted in payment for transportation, whether of passengers or property, for any service connected therewith, 'it being the opinion of the Commission that the prohibition against the charging or collecting a greater or less or *different* compensation than the established rates or fares in effect at the time precludes the acceptance of service, property or other payment in lieu of the amount specified in the published schedules.' It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute. *Union Pac. Ry. Co. vs. Goodridge*, 149 U. S., 690, 691; *Gulf, Col., &c., Ry. Co. vs. Hefley*, 158 U. S., 98, 102; *I. C. C. vs. Ches. & Ohio Ry. Co.*, 200 U. S., 361, 391; *Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S., 423, 439. That rule was established in execution of a public policy which, it seems, Congress deliberately adopted as applicable to the interstate transportation of persons or property. The passenger has no right to buy tickets with services, advertising, releases or property, nor can the railroad company buy services, advertising, releases or property with transportation. The statute manifestly means that the purchase of a transportation

ticket by a passenger and its sale by the company shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the published tariffs."

It would seem that the exact point involved in the instant case has never been directly passed upon by the Interstate Commerce Commission, although the following appears to support the theory contended for by appellant.

In conference ruling of the Commission, No. 224, adopted May 12, 1908, the rule was announced:

"Transportation of Trucks or Cars Destroyed on Foreign Lines.—If a car of one company is destroyed on the line of another company, and the lines of those two companies directly connect with each other, the carrier upon whose line the car is destroyed may transport free, as its own property, to junction with the line of the carrier owning the car, the trucks of the destroyed car, which are understood to be salvage from a wreck, the cost of which must be borne by the carrier on whose line it occurs. If there is not a direct connection between the line of the carrier owning the car and the line upon which it is destroyed, the carrier on whose line the car is destroyed may transport the trucks free to a junction with an intermediate carrier, and pay to the intermediate carrier or carriers their *full tariff rates* for transporting them to a junction with the line of the carrier owner of the car destroyed, and such owner may transport them on its own line as its own property." (Italics by counsel.)

That ruling would seem to establish the proposition that if the line, say, from San Francisco to Roseville Junction, were operated by a different company from that operating the free-haul line from Roseville Junction to Portland, and if joint through rates were in effect over both lines through from San Francisco to Portland, the company operating between San Francisco to Roseville Junction could not charge on a *private shipment*, from San Francisco to Rose-

ville Junction, its proportion only of the joint through rate to Portland, unless the line north of Roseville Junction also received its full proportion of the joint through rate, but must charge its full local rate for the haul from San Francisco to Roseville Junction—in other words, the integrity of the joint through rate would be destroyed if the carrier north of Roseville Junction received any more or less than its correct proportion thereof; and the other carrier becomes immediately entitled to a charge as if no joint through rate existed.

Again, in the case *In re Beekman Lumber Co. vs. St. Louis & San Francisco Railroad Co. et al.* (21 I. C. C. Rep., 207), the decision was thus stated in the syllabus:

"1. Carriers, buying what will ultimately become company material, contract with shippers located off their lines and agree that if the vendor will bill the shipment beyond a designated junction point, where their own lines and the lines of the initial carrier meet, that, of the joint through rate, the purchasing carrier will absorb its own division, the shipper assuming only that portion of the joint through rate which accrues to the initial carriers as their division of the rate up to the junction point designated in the billing. *This practice results in the application of a portion of a joint rate from the point of origin to point of destination, to wit, that portion from point of origin to the junction point, for the use of a particular shipper, which is not published for the benefit of the public at large, nor filed with the Interstate Commerce Commission, under section 6 of the act. Contracts providing for such rates held to be in violation of law. Practice condemned and complaint dismissed.*" (Italics by counsel.)

In this connection it may be suggested that, as to transportation that may be performed jointly by two carriers, there can be no difference whatever whether the transportation be for the Government, or for a private individual, since the only basis upon which such differentiation might be asserted would be on the ground of a contract between one of



the carrying lines and the Government; which, however, would then be a contract as to which the other carriers would have no part or obligation, and, of course, one not contemplated when through joint rates are agreed upon and established between carriers. And thus it must result that, in the matter of joint through rates, the Government stands in exactly the position of a private shipper, unless all carriers under the through rate make an express exception in its favor.

The foregoing would seem to establish that if the transportation had been performed on the two lines, San Francisco to Roseville Junction and from Roseville Junction to Portland, prior to both of the lines coming under the control of a single company, the Government would not have been entitled to demand any less rate of charge from San Francisco to Roseville Junction than the "local" rate.

If the Government's contention be carried out to its last analysis, it would be quite impossible for appellant ever to charge it the fair and reasonable rate of compensation which it lawfully charges private parties for the haul between Roseville Junction and Ogden or San Francisco—in other words, the full "local" rate—even if the Government shipment originated at Roseville Junction and was destined to either of the points mentioned, or to any other points south of Roseville Junction, since it would be possible, under such asserted theory, to demand such carriage at the mileage proportion of a "through" haul from Portland to the point of destination south of Roseville Junction; and, if the carrier refused, it could require the latter to "free-haul" the shipment from Roseville Junction to Portland (although really destined not there, but to a point south of Roseville Junction), and then to immediately return the shipment as a "through" haul from Portland to the point south of Roseville Junction, and then demand of the carrier the mileage proportion rate of the "through" haul.

Such a situation was certainly never contemplated by either of the parties, Government and carrier, to the statutory



contract of July 25, 1866, whereby the Government was accorded the right of free-haul for its troops and property between Roseville Junction and Portland.

By the foregoing illustration, it is, of course, not meant to even suggest that the Government would undertake to deprive the carrier of its lawful measure of compensation by a procedure of that kind, but the illustration is given as a *test* of the theory itself, and if the position asserted will not bear the test of the illustration, it would seem to follow that the position itself is equally untenable.

Finally, the Court of Claims, in its opinion herein below, stated that the method adopted by the accounting officers of the Government in the settlement of this case has been uniform and long continued, citing 8 Comp. Dec., 598 (R., 12).

The decision just cited, however, gave rise to the present suit, which is in the nature of an appeal therefrom to the courts. The few decisions of the Comptroller in which the question arose prior to that mentioned are really not particularly instructive, as they do not present the issue that is involved in this case, since there were some rates to divide, for example, a 50 cent land-grant rate, etc. Here a division of a through rate is impossible, since part of the haul was absolutely "free," and hence there is nothing to divide.

Since this case has been pending in court, and since his said decision in 8 Comp. Dec., 598, *supra*, the Comptroller has naturally adhered to his former ruling, and it may be assumed that he will continue to do so, unless and until this case shall be decided adversely to his said ruling.

Without further prolonging the argument, it is respectfully submitted that the judgment below is erroneous and should be reversed.

Respectfully,

A. A. HOEHLING, JR.,  
*Attorney for Appellant.*

WASHINGTON, D. C., December 16, 1914.

# In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE SOUTHERN PACIFIC COMPANY,	} No. 202.
appellant,	
v.	
THE UNITED STATES.	

APPEAL FROM THE COURT OF CLAIMS.

## BRIEF FOR APPELLEE.

### STATEMENT.

This is an appeal from a judgment rendered by the Court of Claims in favor of the Government, wherein the petition was dismissed. The lower court (R., p. 11) says:

\* \* \* it is readily discernible that the case is exceedingly important because applicable to similar cases involving large amounts and almost daily accountings.

The material facts are, that the appellant operates a railroad from San Francisco, Cal., to Portland, Oreg., via Roseville Junction, a distance of 771.94 miles. From San Francisco to Roseville Junction is 108.03 miles. This portion of the road is operated under lease over lines of the Central Pacific

Railroad Company. Appellant is subject to the terms of the granting act of Congress to the Central Pacific Railroad Company, approved July 1, 1862 (12 Stat., 489, 493, chap. 120), section 6 of which provides:

*And be it further enacted,* That the grants aforesaid are made upon condition that said company \* \* \* shall at all times \* \* \* transport mails, troops and munitions of war, supplies, and public stores upon said railroad for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service).

From Roseville Junction to Portland, a distance of 663.91 miles, appellant operates also under a lease being restricted by the terms of the act of Congress, approved July 25, 1866 (14 Stat., p. 240, chap. 242), section 5 of which provides:

*And be it further enacted,* \* \* \* And said railroad shall be and remain a public highway for the use of the Government of the United States free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States.

During the time in question appellant transported both supplies and troops of the United States Government from San Francisco, Cal., to Portland, Oreg., and *vice versa*, and was paid the published tariff rates, exclusive of the so-called "free haul" over the land-grant portion of the road, which portion extended from Portland to Roseville Junction. The Government, therefore, paid between Roseville Junction and San Francisco only, which was (in round numbers)  $\frac{1}{3}$  of the whole distance between the points of shipment. The through tariff from San Francisco to Portland being 51 cents per hundred pounds, the Government paid  $\frac{1}{3}$  of that amount, or 7.14 cents per hundred pounds.

Appellant contends, as we understand, that it was entitled to the published local rate of 26 cents per hundred pounds from Roseville Junction to San Francisco on through shipments from Portland via Roseville Junction to San Francisco, for the reason that the Portland-Roseville Junction haul was subject to the statutory contract making it a "free haul" and therefore could not be considered; that thus the shipments must be considered as originating at Roseville Junction or San Francisco and subject to the local published tariff between those points.

Appellant sues for \$23,980, being the difference between the amount actually paid at the rate of 7.14 cents per hundred pounds and the local tariff of 26 cents per hundred pounds from San Francisco to Roseville Junction.

The Government maintains that the whole question depends upon the character of the shipments. If they were through shipments, as the Government insists they were, then it was right in paying on a per mileage through rate basis from Roseville Junction to San Francisco, for "private parties" would have paid through rate on a per mileage basis on similar through shipments.

#### ARGUMENT.

Appellee presents its argument under the following heads:

*First.* The Government as a shipper stands in the same position as a private party.

*Second.* The shipments in question were through shipments and would have been so considered had they been for private parties.

*Third.* Being through shipments, the rates to be applied would be through rates, and the charge for the haul from Roseville Junction to San Francisco would be such portion of the through rate as the distance from Roseville Junction to San Francisco bears to the entire distance from Portland to San Francisco.

*Fourth.* The division of the through rate upon a mileage basis, including the land-grant haul, between Portland and Roseville Junction is reasonable and accords with long-established administrative practice and has been generally acquiesced in by railroads.

**FIRST.****THE GOVERNMENT AS A SHIPPER STANDS IN THE SAME POSITION AS A PRIVATE PARTY.**

Section 6 of the act of Congress of July 1, 1862, *supra*, clearly provides that for all service performed for the Government on or over the railroad in question from San Francisco to Roseville Junction the operating company shall charge the Government only what it would if the service were performed for a private shipper. If the shipment was local from San Francisco to Roseville—that is, if Roseville was the “destination”—the rate would be the one prescribed for the haul between those points, and if the shipment originating at San Francisco was “through” to Portland the rate would be the “through” rate. Up to the point of payment every step taken in transportations for the Government must be the same as in the case of a private shipper. The private shipper is required to pay cash. In the case of a through shipment from San Francisco to Portland, or vice versa, the Government had already paid by the donation of land to the railroad company for that proportion of the whole charge accruing between Portland and Roseville Junction. This left it to pay in cash for the distance from San Francisco to Roseville Junction *computed on a proportionate mileage basis of the rate for the whole distance.*

**SECOND.**

**THE SHIPMENTS IN QUESTION WERE THROUGH SHIPMENTS AND WOULD HAVE BEEN SO CONSIDERED IN THE CASE OF PRIVATE PARTIES.**

A through shipment is determined by its characteristics. There must be continuity of movement and no change of destination while in transit. In the case at bar the shipments from Portland or San Francisco were not terminated at Roseville Junction. They were carried throughout in the same cars. There was no return to the Government at Roseville Junction of the possession of any of these shipments. In no instance did the shipments in question originate at Roseville Junction. They originated at either San Francisco or Portland.

If the shipments had originated at Portland, and their destination was Roseville Junction, and the trains were stopped there, and as an afterthought the goods were reloaded and shipped under a separate contract to San Francisco, then it could have been said that in the subsequent shipments the point of origin was Roseville Junction.

It has been held in the case of *Texas & N. O. R. R. Co. v. Sabine Tram Co.* (227 U. S., 111), and many other cases cited therein, that the test of a through shipment does not depend upon the bill of lading. The point of destination of the shipment determines the question as to whether it is a through shipment, regardless of the bill of lading, or whether the shipments were stopped in transit. The destination of

shipments from Portland was San Francisco, and from San Francisco the destination was Portland. Roseville Junction was not the point in either case. If a private party had shipped between Portland and San Francisco, the goods being destined for either point and there was no break in transit, and the goods were not returned to the shipper at any intermediate point, such characteristics would have denoted a through shipment and appellant could not have charged anything more than the through rate. The Government maintains that as its shipments bore the foregoing characteristics they were through shipments.

In the case of the *Montpelier and Wells River R. R. Company v. The United States* (187 Fed., 271) a rebating case, the United States circuit court of appeals has recognized the application of the through rate as lawful where there was a joint traffic agreement although the last road handling the commodity had purchased the same for its own use and had required a rebate of the part of the tariff which would have been due it if the shipment had been for other individuals. The shipment was from Echo, Pa., and delivered at Montpelier, Vt., on appellant's railroad, just 6/10 miles beyond where this railroad connects with the Central Vermont Railway. The commodity was coal and was for the use of the Montpelier and Wells River Railroad Company. "The railroads connecting Echo, Pa. with Montpelier, Vt., had established a joint tariff,



for transporting coal from Echo to Montpelier, of \$3.55 per gross ton and from Echo to Wells River, and intermediate stations on appellant's line, of \$3.80 per gross ton."

If another party had shipped the coal from Echo to the point of destination on the Wells River Railroad Company's road the Central Vermont Railway would have received its proportionate share, being \$3.05 per gross ton, and the Montpelier and Wells River Railroad Company would have received 75 cents per gross ton.

The coal was billed (whether inadvertently or not does not appear) to Wells River, Vt. Although it only carried the coal 6/10 miles over its own line, and the coal was for its own use, nevertheless it was held that the fact that appellant had the coal billed at a \$3.80 rate and took its divisional share of 75 cents did not, therefore, render it subject to prosecution for receiving a rebate in violation of the interstate commerce act of February 4, 1887, and as amended, etc. In this case the Central Vermont Railroad Company accepted at its terminus a payment, based on the through shipment rate, which was 50 cents per gross ton less than the regular tariff over its own line.

The decision here recognizes the rule and practice of railroads in making a joint through tariff rate of accepting less per mile for a through shipment than they would receive respectively if the shipment were local.

## THIRD.

BEING THROUGH SHIPMENTS, THE RATES TO BE APPLIED WOULD BE THROUGH RATES, AND THE CHARGE FOR THE HAUL FROM ROSEVILLE JUNCTION TO SAN FRANCISCO WOULD BE SUCH PORTION OF THE THROUGH RATE AS THE DISTANCE FROM ROSEVILLE JUNCTION TO SAN FRANCISCO BEARS TO THE ENTIRE DISTANCE FROM PORTLAND TO SAN FRANCISCO.

In the case of the *Atchison, Topeka and Santa Fe R. R. Company v. United States* (15 C. Cls., 126) it was held that "through service is to be computed at through rates; local at local rates." The shipments in the case at bar being through shipments, appellant was limited to charging the Government under the act of July 1, 1862, *supra*, the same rate per mile per hundred pounds as an individual. The rate per mile per hundred pounds for an individual was 7.14 cents, so that the railroad was only entitled to that amount.

Counsel for appellant asserts on page 12 of his brief that:

It would seem practically impossible to dispose of this case under the theory of a prepayment of freight charges by means of a land grant, \* \* \*

and further—

the application of any such theory is not legally permissible, and this for the reason that tariff rates are based upon the money charged; and free passes in settlement of damage claims, newspaper advertisements, or in payment of railroad rights of way, etc., find no

place in the tariffs authorized and required by law.

It is argued, in substance, that the desire for a free haul was not the only motive of the Government in granting lands to the railroad. How this is germane to the question at issue is not clear. The Government maintains that it is immaterial what other motives the Government may have had for granting land to the railroad. A "free haul" was one motive, and a valuable consideration, which was sufficient to bind the railroads to carry the Government's troops and supplies free of charge, and since no subsequent acts of Congress have annulled these contractual relations, the fact exists that these land grants did act as a prepayment of freight charges to appellant. As this method of payment by the Government was created prior to the passage of the act of June 29, 1906 (amendatory of the act to regulate commerce, approved Feb. 4, 1887), and is in no sense nullified by said act, we are unable to understand counsel's contention that the freight shipments for the Government had not been paid in advance from Portland to Roseville Junction. If it was paid in advance to Roseville Junction, then the only charge that could be made from that point to San Francisco, on a through shipment, would be the proportion for the haul from Roseville Junction to San Francisco.

Counsel on page 12 of his brief quotes from the case of the *Louisville & Nashville R. R. Co. v. Mottley* (219 U. S., 467, 476, 477). The facts there were that a

railroad company had given free annual passés for a consideration to certain parties for their respective lives. Such passes were declared illegal by the act of June 26, 1906 (amendatory of the act to regulate commerce, approved Feb. 4, 1887). A part of the opinion as quoted by counsel is as follows:

That money only was receivable for transportation is the basis upon which the Interstate Commerce Commission has proceeded; for, in one of its conference rulings (207) issued in 1909, the Commission held that nothing but money could be lawfully received or accepted in payment for transportation, whether of passengers or property, for any service connected therewith, "it being the opinion of the Commission that the prohibition against the charging or collecting a greater or less or *different* compensation than the established rates or fares in effect at the time precludes the acceptance of service, property or other payment in lieu of the amount specified in the published schedules." It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute. *Union Pac. Ry. Co. vs. Goodridge*, 149 U. S., 690, 691; *Gulf, Col. &c. Ry. Co. vs. Hefley*, 158 U. S., 98, 102; *I. C. C. vs. Ches. & Ohio Ry. Co.* 200 U. S., 361, 391; *Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S., 426, 439. (Page 13.)

This case is not apposite. The court's opinion emphasizes the fact that the act to regulate commerce

was primarily enacted to secure uniformity in the charges made by the railroads for transportation of the person and property of individuals, and to guard against or prevent, if possible, the carriers from discriminating between individual shippers or passengers. So far as these matters are concerned, the decision referred to is clear and final, but that is not the issue here. The carriers had a right, so far at least as any restrictions contained in the legislation regulating interstate commerce is concerned, to "discriminate" as between the Government and individuals; that is to say, there is nothing in the act to regulate commerce, approved February 4, 1887, or any of the acts amendatory thereof or supplementary thereto, which forbids a railroad company's departing from its published schedule of rates when the service performed is for the United States. This precise question has never been before this court. The Interstate Commerce Commission, however, ruled on the subject on May 27, 1907:

The Commission is of the opinion that carriers, either by contract or bid or other arrangement with the War Department, may lawfully make special rates or fares for the movement of federal troops, when moved under orders and at the expense of the United States Government, and that the rates or fares so made need not be posted or filed with the Commission.

The lawfully published rates or fares for the transportation of the general public, in the opinion of the Commission, are to be re-

garded, however, as the maximum rates and fares that may lawfully be charged the Government for the movement of federal troops.

\* \* \* \* \*

(Conference Rulings Bulletin No. 6, p. 68, sec. 218.)

The soundness of this ruling can not be questioned when we take into consideration the history and purpose of the legislation regulating interstate commerce. It is, however, deemed unnecessary to go into that subject here. The Government was entitled, so far as the law regulating interstate commerce is concerned at least, to receive whatever benefit accrued to it by virtue of the so-called "land grant" contract or any other arrangement made with the carrier for the transportation of its property or its servants.

#### FOURTH.

THE DIVISION OF THE THROUGH RATE UPON A MILEAGE BASIS INCLUDING THE LAND-GRANT HAUL BETWEEN PORTLAND AND ROSEVILLE JUNCTION IS REASONABLE AND ACCORDS WITH LONG-ESTABLISHED ADMINISTRATIVE PRACTICE AND HAS BEEN GENERALLY ACQUIESCED IN BY THE RAILROADS.

If the propositions advanced under the preceding heads are sound, the Government is entitled to receive the benefit of the through rates from Portland to San Francisco, and the only possible question remaining is upon what basis said through rate should be apportioned. We need not concern ourselves as to what would be an equable and fair division on the theory that two separate lines perform the service on a joint or through rate. The fact is that the road from San Francisco to Portland is one line,

offering to private shippers through rates on a through shipment. We have seen that the Government is entitled to the same treatment as private shippers. The only question, therefore, is what is a fair and reasonable way of apportioning the rate from San Francisco to Roseville Junction. The United States has taken the position in all such cases that a mileage basis of division is fair, i. e., that the through rate should be divided by the whole number of miles from San Francisco to Portland to ascertain the rate per mile. The quotient so obtained should then be multiplied by the number of miles between San Francisco and Roseville Junction. The product multiplied by the number of units transported will give the amount which the claimant is entitled to receive in cash for the through transportation, the remaining portion having been paid for by the land grant as aforesaid.

The fairness of such a basis of division seems obvious. It is very closely analogous to that used in the taxation of interstate railroads and telegraph lines upon such a proportion of their total capital as the mileage within a given State bears to their total mileage.

*Pullman Palace Car Co. v. Pennsylvania* (141 U. S., 18);

*W. U. Tel. Co. v. Attorney General of Mississippi* (125 U. S., 530);

*State Railroad Tax Cases* (92 U. S., 575);

*Erie Railroad v. Pennsylvania* (21 Wall., 492);

*Del. R. R. Tax* (18 Wall., 206).

Probably no method could be devised which would measure with absolute accuracy the relative contribution of each road or each section of the same road to the whole transportation, but under ordinary circumstances the mileage basis would approximate such accuracy more closely than any other. It is the method customarily used by the railroads themselves in dividing their joint through rates, unless some particular reason intervenes, as, for instance, a substantial difference in the topography of the country through which the two lines run.

It is also the basis of division (R., 10, finding 14) in use where the through haul is partly over 50 per cent land-grant and partly over nonland-grant road.

Furthermore, appellant has neither suggested any fairer basis of dividing the through rate nor suggested any valid reasons why this basis of division is unfair. Its argument, if we rightly apprehend it, is not that the through rate is unfairly divided, but that it ought not to apply at all.

The mileage basis of division was adopted by the United States from the very first, and, with perhaps some sporadic exceptions, consistently adhered to.

This is shown by a long series of decisions of the Comptroller of the Treasury, of which the following is a partial list:

- Digest 2d Comp. Dec., Vol. II, sec. 1070;
- Digest 2d Comp. Dec., Vol. III, sec. 1164;
- Digest 2d Comp. Dec., Vol. III, sec. 1396;
- Digest 2d Comp. Dec., Vol. IV, sec. 360;
- 8 Comp. Dec., 334, 339;



- 8 Comp. Dec., 598;
- 17 Comp. Dec., 486;
- 18 Comp. Dec., 238;
- 18 Comp. Dec., 949.

Also the following manuscript opinions:

- 40 Comp. Letter Book 4, May 1, 1909;
- 28 MS. Comp. Dec., 722, Feb. 24, 1904;
- 47 MS. Comp. Dec., 1209, Dec. 2, 1908;
- 51 MS. Comp. Dec., 848, Nov. 19, 1909;
- 57 MS. Comp. Dec., 132, Apr. 8, 1911;
- 58 MS. Comp. Dec., 921, Aug. 31, 1911.

Appellant presented this very claim to the Comptroller of the Treasury. His opinion, favorable to the Government and containing a very full discussion of the history of these land-grant cases and the decisions of prior comptrollers, may be found in 8 *Comptroller's Decisions*, 598. After describing the various kinds of Government-aided roads, (1) bond-aided, (2) 50 per cent land grant, and (3) free land-grant roads, he says (pp. 605, 606, 607):

The fundamental principle upon which the adjustment of compensation is required to be made is that the basis of compensation should not be in excess of the rates charged the public for the same kind of service. This principle should govern even in the absence of legislation, and whether service is over *aided* or *non-aided* lines. No railroad contends for any other basis of settlement.

Where the earnings are determined in accordance with this principle, settlement therefor is made as required by law: Namely—

Nonaided roads are paid in full;

Bond-aided roads are credited with their earnings;

Fifty per cent land-grant roads are paid one-half of their earnings;

Free land-grant roads are paid nothing.

Where the entire service is over any one of these different classes of roads the determination of the earnings and the settlement therefor present no difficulty.

Where the service is partly over aided and partly over nonaided roads which together form a continuous line, over which a through rate is available to the public, the question may arise whether the Government is entitled to the benefit of the said through rate.

Where rates are established by a common carrier for transportation services, the public generally, and the Government as a part of the public, are entitled to such services at the established rates. Though reduced rates might be given the Government, and, in the absence of statute, to any particular person, yet no higher rates than those established and published would be permitted. The rates offered to the public are therefore available to the Government for like transportation.

Where the entire service is over two or more nonaided roads, the division of the earnings between the different roads is of no concern to the Government, except that when separate settlements are made with the different roads each road would be entitled to its proportion of the total earnings. Such total earnings are generally divided between the different roads

in interest on an agreed basis, but in the absence of an agreement a mileage basis is adopted as both equitable and practical.

*This uniform practice of the accounting officers has been acquiesced in by all railroads to the present time, and should not now be changed unless clearly wrong.* (Italics his.)

The present case was not, however, the first to come to the attention of the Comptroller of the Treasury. The earliest arose in January, 1884, and appears in the *Digest of the Second Comptroller's Decisions*, Volume II, section 1070, as follows:

The Atchison, Topeka & Santa Fe Railroad Company, operating three several roads (one a land-grant and the others not) having reduced the through rate below the sum of the three local rates: *Held*, that the only feasible mode of settlement is to apportion the whole amount between the land-grant and nonland-grant roads upon a mileage basis.

This was followed in 1889 by a case in *Digest Second Comptroller's Decisions*, Volume III, section 1396:

The practice of the War Department of using separate requests for transportation to each road in the contemplated route having been adopted for the sole convenience of the railroads: *Held*, That such requests will be presumed to be for limited tickets; that for travel upon them credit must be given the bond-aided railroads on the basis of through limited rates, and that in the absence of positive proof that the holders thereof stopped over the burden

will be on the railroads to rebut the presumption that the travel was by a continuous journey.

Another early decision involved the Portland-Roseville Road (*Digest 2d Comp. Dec.*, Vol. III, sec. 1164, May 11, 1892):

In case of transportation en route over the lines of the California & Oregon and Oregon & California Railroad Companies, service on which is free to the Government under section 5 of the act of July 25, 1866 (14 Stat., 239), the carrier is not justified in charging local rates for that part of the service which is not over the free roads, thus depriving the Government of the benefit of through rates. The proper charge is a mileage proportion of the amount which the Government would be obliged to pay for the entire service if not entitled to free service.

So in *Digest Second Comptroller's Decisions*, Volume IV, section 360 (June 15, 1894), we find the following:

The true principle to govern in the matter of railroad transportation is that the Government shall have the benefit of through limited rates when it can comply with all the conditions appertaining to such rates, as it must do where no road of the through route is bond-aided. \* \* \* Equity and good conscience dictate that the railroad shall not by its after agreement or regulation entered into with connecting lines set a condition impossible of fulfillment on the part of the Government, and thereby prevent the Government from ob-

taining as low rates for similar transportation as the bond-aided railroad conceded to a single individual on a cash-prepaid limited through ticket.

The other decisions of the comptroller, cited above, are equally instructive, but it seems unnecessary to enter into a discussion of them individually. It is sufficient to say that they show conclusively a long-continued and well-established interpretation of the law by the highest administrative officials in accord with the present contention of the United States.

Respectfully submitted.

HUSTON THOMPSON,  
*Assistant Attorney General.*

**SOUTHERN PACIFIC COMPANY v. UNITED STATES.**

**APPEAL FROM THE COURT OF CLAIMS.**

No. 202. Submitted March 11, 1915.—Decided April 12, 1915.

Where a railroad company transports property and troops of the United States over a continuous line of railroad part of which is free-haul and the remaining part is pay line, the character of the shipment fixes the rate and the Government can be charged a proportionate part of the through rate only, and not the local rate on that part of the haul which is over the pay line.

A provision in a railroad land grant statute that the government shall always have the right to ship over the line at fair and reasonable rates not to exceed those paid by private parties entitles the Government

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to the benefit of the long haul rate and to pay the proportionate part of the rate and not be charged the local rate over the pay line.  
48 Ct. Cl. 227, affirmed.

THE facts, which involve questions relating to the amount which the United States can be charged for transportation over a land grant railway, are stated in the opinion.

*Mr. A. A. Hoehling, Jr.*, for appellant.

*Mr. Assistant Attorney General Thompson* for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The appellant, the Southern Pacific Company, operates under a lease a line of road from San Francisco, via Roseville Junction, to Portland. The line to Roseville Junction, a distance of 108.03 miles, was built as part of the main line extending from San Francisco to Ogden, Utah, by the Central Pacific Railroad Company under an act of Congress of July 1, 1862 (12 Stat. 489). By § 6 of that act the land grants for the construction of the road were made "upon condition that said company . . . shall at all times . . . transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service). . . ."

The line from Roseville Junction to Portland, a distance of 663.91 miles, was constructed under the act of

Congress approved July 25, 1866 (14 Stat. 239). Section 5 of that act provided:

"And said railroad shall be and remain a public highway for the use of the Government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States: And the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States."

Between August, 1897, and March, 1902, the Southern Pacific Company transported for the United States persons and property over said line via Roseville Junction "from points on either side thereof to points on the other side; thus, from San Francisco, Ogden, and other points . . . to Portland via Roseville Junction. The shipments in question did not originate at Roseville Junction nor terminate at Roseville Junction, but were carried through on one continuous transit over both the free haul and the nonfree haul portions of the road precisely as any through shipment is carried for a private shipper." (Finding VI.)

For the services thus rendered the company presented its bills to the accounting officers of the Government in which, while nothing was charged for services rendered over the portion of the road which was free, the local rate was exacted between San Francisco and Roseville Junction. We say the local rate because it is certain that at the times in question the railroad had duly established and published schedules of rates embracing local rates to Roseville Junction as well as through rates to Portland and other points via Roseville Junction, the local rates being higher than the through rates. The accounting officers refused to allow the claims in full insisting that the Government was entitled to the benefit of the through rate. They therefore distributed the through rate over



the whole distance and deducted from the aggregate of the bills the difference between the sum which had been made up by charging the local rate and the sum which would be due charging only the through rate ascertained upon the mileage basis as above stated. The sum remaining due under the operation of this method was received by the railroad company under protest and this suit was commenced in the court below to recover the difference.

Upon the finding of the facts above stated and the legal conclusion that under the statutes the railroad was without right to refuse to allow the through, and charge the local, rate its claim was rejected. 48 Ct. Cls. 227. This appeal was then prosecuted.

There is no controversy concerning the method by which the sum of the applicable through rate was ascertained by the accounting officers of the Government. There are, hence, as stated in the argument of appellant, no disputed facts, and the question for decision is a narrow one since, as further stated in that argument:

"The present appeal presents but a single question of law, and that is as to the legal rate of compensation to which the railroad company is entitled for the transportation of property and troops of the United States over a continuous line of railroad, part of which is free-haul and the remaining part of which is pay line."

The entire theory upon which it is contended that the through shipments could be subjected to a local rate from San Francisco northward to Roseville Junction and southward from Roseville Junction to San Francisco finds clear expression in the argument on behalf of the railroad company as follows:

"While there is a continuous rail line between those two points [San Francisco and Portland] the line itself, from the standpoint of compensation or pay to the railroad company, *breaks* at Roseville Junction; *south* of that point it is 'pay' line; *north* thereof, it is 'free-haul' line; and it

so happens that appellant company, as lessee, operates *both* lines."

1. But the error of the proposition is manifest as it confounds cause and effect since it assumes the unassumable, that is, that the question of whether traffic is to have the benefit of the lesser through rate or be subjected to the higher local rate is to be determined by the sum of the compensation asked for its carriage instead of by the nature and character of the movement of the traffic, that is, whether it was a through or a local movement. In other words, the proposition is, not that the character of the movement fixes the rate, but that the rate determines the character of the movement. The confusion involved in, and the destructive results which would flow from, the proposition cannot be better illustrated than by considering that the foundation upon which a lesser charge is justified for a through shipment than is exacted for a local shipment is the less cost to the carrier of doing the through business than is incurred in doing the local business. Therefore, to adopt the proposition would require a reversal of the standards by which the character of traffic is fixed. And the terms in which the contention is stated bring out in bold relief the fallacy which it contains, since while it admits "there is a continuous rail line between those two points" (San Francisco and Portland), it yet declares that "the line itself, from the standpoint of compensation or pay to the railway company, *breaks* at Roseville Junction;" that is, not that the continuous physical line of rail over which the through transportation moves is in any way broken, but that by a break (change) in the line of compensation an imaginary break in the physical line itself is to be assumed to the end that a shipment which is inherently through may be converted into one which is essentially local.

2. But apart from the mere question of the abstract error in the proposition relied upon, it is clear that to

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accept it would give rise to a plain violation of the provisions of the act of Congress governing the movement of traffic over the road from San Francisco to Roseville Junction, since that act exacts that the Government shall at all times have the right to ship over the road "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service." As the findings clearly establish that the schedules filed and published contained a through rate for a shipment from San Francisco to Portland via Roseville Junction, and *vice versa*, it would seem to be indisputable that by the very terms of the act such through rate so published and filed was open and available to the United States for its through shipments. This must be the case unless it can be said that because the United States had acquired an increased advantage concerning the movement of its shipments from Roseville Junction to Portland, therefore it had lost the right to have its through shipments treated as such from San Francisco to Roseville Junction. And it is to be observed that there is no ground for saying that the existence of the right in favor of the United States to a free haul beyond Roseville Junction to Portland subjected the road in hauling from Roseville Junction to San Francisco, or *vice versa*, to a greater cost, since the findings in express terms establish that the freight shipped through by the United States was carried by a continuous movement under exactly similar conditions as was all other through freight carried for private individuals.

*Affirmed.*

MR. JUSTICE McREYNOLDS took no part in the consideration and decision of this case.

(24,218)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 482.

THE TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF  
IN ERROR,

*vs.*

CLARA HILL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.

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UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on Saturday, November 22nd, A. D. 1913, at New Orleans, Louisiana, before the Honorable Don A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Honorable Rufus E. Foster, District Judge.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,  
versus  
CLARA HILL, Defendant in Error.

Be it remembered, That heretofore, to-wit, on the 1st day of December, A. D. 1913, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the United States, for the Western District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2587, as follows:

(a)





CAPTION.

The United States of America,  
Western District of Texas.

BE IT REMEMBERED that at a regular term of the United States District Court in and for the Western District of Texas, the Honorable Thomas S. Maxey, United States District Judge, presiding, and holding its sessions at San Antonio, Texas, and which term began on the 5th day of May, A. D., 1913, and continued in session to and including the 18th day of July, A. D., 1913, there came on to be heard and determined, amongst other causes pending on the docket, the following cause:

No. 182 Law,

CLARA HILL

vs.

THE INTERNATIONAL & GREAT NORTHERN  
RAILWAY COMPANY AND THE TEXAS  
& PACIFIC RAILWAY COMPANY.

**TRANSCRIPT FROM DISTRICT COURT OF FRIO COUNTY**

THE STATE OF TEXAS,  
COUNTY OF FRIO.

At a term of the District Court begun and holden  
at Pearsall, within and for the County of Frio, be-

fore the Hon. J. F. Mullally, and which is now in session, the following case came on for trial, to-wit:

No. 1336 Law.

CLARA HILL,

vs.

I. & G. N. RY. CO. AND THE TEXAS & PACIFIC  
RAILWAY CO.

---

NOTICE OF REMOVAL.

In District Court, Frio County, Texas.

Clara Hill

vs.

No. 1336.

I. & G. N. Ry Co. and The Texas & Pacific Railway  
Company.

To plaintiff or Magus Smith, attorney of record for  
the said Clara Hill, plaintiff:

This is to notify you that the defendant, The Texas  
& Pacific Railway Company, in the above numbered  
and entitled cause will, hereafter, within the time  
allowed by law, file, in the above Court, petition and  
bond for the removal of said cause to the District  
Court of the United States for the Western District  
of Texas.

W. T. ARMISTEAD,

Attorney for Defendant.

The Texas & Pacific Railroad Company.

Service of above notice is this day accepted, and all further notice and service of the filing of said petition and bond for removal are waived.

This 14th day of September, A. D., 1912.

MAGUS SMITH,  
Attorney for Plaintiff.

Endorsed: No. 1336.

Clara Hill vs. I. & G. N. Ry. Co. and The Texas & Pacific Railway Co.

Notice of Removal.

Filed this September 14, 1912 at 9:10 a. m. John L. Pranglin, District Clerk, Frio county.

### PLAINTIFF'S ORIGINAL PETITION.

In the District Court of Frio County, Texas, September Term, A. D., 1912.

Clara Hill

vs.

I. & G. N. Ry. Co. et al.

*To the Hon. J. F. Mullaly, Judge of said Court:*

Now comes Clara Hill, plaintiff, complaining of the International & Great Northern Railway Company and the Texas & Pacific Railway Company and respectively shows to the Court:

That plaintiff resides in Frio County, Texas, and the defendant International & Great Northern Railway Company is a corporation, duly incorporated under the laws of the State of Texas, with its line of railway running into and through the county of Frio and State of Texas, with its connecting line of railway the Texas & Pacific Railway running to and through the town of Atlanta, Texas; that the said International & Great Northern Railway Company

has a local office and agent in Frio County, Texas, upon whom the service of citation may be had in this case.

Plaintiff avers that on or about the 21st day of December, A. D., 1911 she applied to the agent of the International & Great Northern Railway Company as a connecting carrier for a through ticket from Pearsall, Texas, to Atlanta, Texas, and that she was granted a through rate, paid him the fare demanded, through to destination, that she was by him given a writing evidencing her payment of the fare and her right to ride on the International & Great Northern Railway and the Texas & Pacific Railway to destination. That this writing was honored by the Texas & Pacific Railway Company and she was accepted and became a passenger on the Texas & Pacific Railway. That said two railways were connecting carriers, whose connecting lines connected at Longview, Gregg County, Texas. That the line of the International & Great Northern Railway Company extends from Pearsall, Texas, to Longview, Texas, and that of the Texas & Pacific Railway Company extend from Longview, Texas, to and through the town of Atlanta, Texas; that plaintiff was received by the International & Great Northern Railway Company and transported on the ticket or instrument of writing to Longview, Texas, where she was received by the Texas & Pacific Railway Company, and transported on the same ticket or instrument of writing, safely to a point in Cass County near Atlanta, Texas, where on or about the 22nd day of December, 1911, by reason of the negligence of the Texas & Pacific Railway Company, its agents and employees, there was a collision of two trains, and plaintiff was severely and permanently injured. Plaintiff further alleges that the International &

Great Northern Railway Co. and the Texas & Pacific Railway Co. are partners and acting as agents of the other in making the contracts of transportation.

Plaintiff further alleges that at the date of the transportation and the injuries complained of as well as at the date of the filing of this suit, the International & Great Northern Railway Company, owned and operated a line of railway in Frio county, Texas, with a local agent residing and representing it at Pearsall, in said county.

Plaintiff avers that by reason of said collision the said Clara Hill was seriously and permanently injured in the following respect: She received a severe shock and concussion, and by reason thereof her nervous system was severely shocked and injured, and impaired. That by reason of the impaired condition of her nervous system she is afflicted with nervous prostration, which makes it utterly impossible for her to perform labor of any kind; that by reason of said shock and concussion, the said plaintiff's spine and spinal column in their entirety were injured and impaired to such an extent as to cause the said Clara Hill great pain and nervous agitation; that by reason of said shock and concussion, her hip and back were severely and permanently injured; that by reason of said shock and concussion her ovaries were so severely injured that it caused them to be so inflamed and ulcerated that it became necessary that both be removed; also the shock to her appendix caused the same to become so ulcerated and infected to that extent that it became necessary also to remove it; that by reason of said injuries to her spinal column and hip, and ovaries and appendix, she suffered and has continued to suffer great pain; that

said injuries has caused her great mental and physical misery.

Plaintiff avers that the aforesaid injuries of said Clara Hill are permanent and by reason thereof the said Clara Hill has been reduced from a strong, healthy young lady to that condition of an invalid; that while she is a young girl, by reason of said injuries she has been placed in a physical and nervous condition, that will render the functions of womanhood void which will remain with her the balance of her life; that on account of said injuries the said Clara Hill has suffered great mental and physical pain and will continue to suffer great mental and physical pain constantly hereafter.

Plaintiff further alleges that by reason of the aforesaid injuries it was absolutely necessary to obtain the treatment of physicians and to have hospital services and drugs, by reason thereof, physicians were employed at the reasonable charge and value of twelve hundred (\$1,200.00) dollars, and hospital services and drugs were obtained together with that of nurses at the reasonable charge and value of six hundred (\$600.00) dollars.

Plaintiff further avers that at the time she was injured she was engaged as a clerk in a store, and was able to earn and was earning about five hundred (\$500.00) dollars per annum, which she had the reasonable expectancy of increasing in the future; that before said injuries were inflicted plaintiff was in perfect health, never having been ill scarcely a day in her life, and was able to do hard mental and physical work, but since said injuries, by reason thereof her earning capacity to do mental and physical work has been so greatly impaired that she is not able to do work of any kind, and her earning capacity has been completely and permanently destroyed.

Premises considered plaintiff says that she has been damaged by reason of personal injuries so inflicted upon her in the sum of forty thousand (\$40,000.00) dollars and in addition thereto has been compelled to expend the sum of twelve hundred (\$1,800.00) dollars for physicians, hospital services, drugs and nurses as aforesaid, making the sum of forty-one thousand eight hundred (\$41,800.00) dollars.

Plaintiff further avers that she cannot more fully state the facts constituting the defendant's negligence than she has done in this petition as the facts are peculiarly within the possession of the defendant, that she cannot more specifically describe her injuries than she has done in this petition.

Premises considered plaintiff says that she has been damaged in the sum of forty-one thousand two hundred (\$41,800.00) dollars, of which sum after due citation and hearing she prays judgment and for cost and general relief.

PERRY J. LEWIS,  
H. C. CARTER, and  
MAGUS SMITH,  
Attorneys for Plaintiff.

Endorsed: No. 1336.

Clara Hill vs. I. & G. N. Ry. Co.

Plaintiff's Original Petition.

Filed 24th day of August, 1912. John L. Pranglin,  
District Clerk, Frio county, Texas. By Robert Hud-  
son, Deputy.



PLEA IN ABATEMENT.

In the District Court, Frio County, Texas.

Filed September 17, 1912.

Clara Hill

vs.

No. 1336.

I. & G. N. Railway Co. and T. & P. Ry. Co.

Now comes the International & Great Northern Railway Company, one of the defendants herein, and moves the Court to dismiss said cause as to said defendant, for the following reasons:

1.

This defendant is improperly joined in this suit with the T. & P. Ry. Co. for the reason hereinafter shown, said suit being based upon the contract for the transportation of passenger, that is to say, for injuries alleged to have been received by the plaintiff by reason of the alleged wrongful and negligent acts by the T. & P. Ry. Co. in Cass County near Atlanta, Texas, on or about the 22nd day of December, 1911, and said suit is not based upon any damages, loss or other cause growing out of the transportation or contract in relation to the carriage of passengers, freight, baggage or other property.

2.

That said suit shows upon its face to be based upon damages for injuries to the person of plaintiff while a passenger on the T. & P. train, and not for any loss of personal property or in respect to other

property under contract for the transportation thereof, and if said suit is based upon the act approved March 13, 1905, Twenty-ninth Legislature, pages 29 and 30, then this defendant says said act of the legislature has no application to cases of this kind, and said act is void and inoperative for said purpose or any other purpose as fixing or attempting to fix the venue of suit for injuries done to passengers by the foreign road. That said act does not clearly express in its caption such purpose and the word passengers only occurs in the caption where the damages "of the transportation or contract in relation to the carriage of passengers or freight, baggage or other property et cetera," and the word passengers only occurs in the body of the act in the fourth word of the first line, and never thereafter occurring in the body of said act, and said law is therefore void and of no force or effect either as an original act or as an amended act, since the same did not comply with the provisions to the law and the constitution as contained in Article 3 thereof, and the sections of said article prescribing and setting forth the manner in which original bills should be proposed and introduced, and the amendments of any law. Said act is in conflict if construed to fix venue in Frio county, with Act 1901, p. 31. (See Rev. Civ. Stats. of 1911, Arts. 1830, pp. 25-26.)

3.

The International & Great Northern Railway Company is a corporation organized, created and incorporated under the laws of the State of Texas, doing business in said State. That the Texas & Pacific Railway Company is a railroad corporation organized and incorporated under a law of Congress with

all the powers of a railroad company, organized and operating its separate railroad through the northern portion of the State of Texas, and denies that the International & Great Northern Railway Company and the Texas & Pacific Railway Company were then, or at any other time, partners acting as agents of the other in making contracts of transportation, having only corporate powers as the law vests them with as common carriers of passengers and freight, operating separately and independently.

4.

That the plaintiff's petition shows on its face that plaintiff was traveling upon a ticket alleged to have been sold to her, from Pearsall to Longview, Texas, and that she was injured on or about the 22nd day of December, 1911, after she had left this defendant's line of road, caused by the negligence of the Texas & Pacific Railway Company, its agents or employees, by a collision of two trains on the line of the Texas & Pacific Railway Company, and not by or upon the line of the International & Great Northern Railway Company, as shown by the allegations of her said petition, and no where on the property or line of the road owned or operated by the International & Great Northern Railway Company, and for that and other reasons the petition shows that this said defendant is improperly joined in this case because there is no cause of action against it; and this defendant believes and charges there is no cause of action against it; and this defendant believes and charges that the said suit was filed in Frio county against both of the said defendants to secure said jurisdiction in said Court and in said county.

5.

Wherefore for the reasons stated and because plaintiff's pleading has shown no cause of action against this defendant, it prays to be dismissed from said cause, and said suit be hence abated as against this defendant, and of this prays the judgment of the Court.

COBBS, ESKRIDE & COBBS,

Attorneys for Defendant I. & G. N. Ry. Co.

And now comes J. N. Kilgore, an agent and representative of the International & Great Northern Railway Company, after having read the said allegations of said petition, doth upon oath say that the same are true as therein stated.

J. N. KILGORE.

Sworn to and subscribed before me this the 17th day of September, A. D., 1912.

(L. S.)

IRBY J. HUDSON,

Notary Public in and for Bexar County, Texas.

Endorsed: No. 1336.

Clara Hill vs. I. & G. N. Ry. Co. and T. & P. Ry. Co. In the District Court, Frio County, Texas.

Plea in Abatement.

Filed September 17, 1912. John L. Pranglin, Clerk District Court, Frio County, Texas. By Robert Hudson, Deputy.

---

### PETITION FOR REMOVAL.

In the District Court of Frio County, Texas, Forty-Ninth Judicial District.

Clara Hill

vs.

No. 1336.

I. & G. N. Ry. Co. and The T. & P. Ry. Co.

The petition of the Texas & Pacific Railway Company respectfully shows to the Court:

1. That the Texas & Pacific Railway Company was, and is, a corporation, duly organized and existing under and by virtue of the laws of the United States, to-wit: "An Act to incorporate The Texas & Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and Acts amendatory thereof and supplemental thereto, including an Act approved May 2, 1872, whereby, among other things, the name, style and title of said Texas Pacific Railroad Company was changed to "The Texas & Pacific Railway Company."

2. That the above entitled action was commenced in the above named Court on the 24th day of August, A. D., 1912, and citation issuing therein was served upon this defendant on the 5th day of September, A. D., 1912, which said citation is returnable on the 3rd Monday in September, A. D., 1912, it being the 16th day of September, 1912, and this defendant is not, and will not be required, by the laws of the State of Texas, or the rule of this Court, to answer or plead to the petition of the plaintiff before the 17th day of September, A. D., 1912.

3. That the matter in dispute in this case exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and this suit arises under the laws of the United States as hereinbefore and herein-after more fully set forth; that this action was brought by the plaintiff, Clara Hill, against the Texas & Pacific Railway Company, a federal corporation, and filed in the District Court of Frio County, Texas, Forty-ninth Judicial District of Texas, wherein she sues for \$41,200.00, for personal injuries in which petition she avers that on or about the 21st day of

December, 1911, she applied to the agent of the International & Great Northern Railway Company, as a connecting carrier for a through ticket from Pear-sall, Texas, to Atlanta, Texas, and that she was granted a through rate, paid him the fare demanded to destination and that a regular ticket was issued to her and she was honored as a passenger thereon over the Texas & Pacific Railway Company, and that on the 22nd of December, 1911, by reason of the negligence of the Texas & Pacific Railway Company, there was a collision of two trains, and the plaintiff was severely and permanently injured, causing her great mental and physical pain, with prayer for her damages in the sum of \$40,000.00, together with \$1,200.00 for physicians, hospital, drugs and nurses, and general relief.

The State of Texas, County of Frio.

W. T. Armistead, being duly sworn, says that he is the agent of the Texas & Pacific Railway Company, being the attorney in charge of this case for said company; that the said The Texas & Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States; that he has read the foregoing petition and knows the contents thereof; that the facts therein stated are true.

W. T. ARMISTEAD.

Sworn to and subscribed before me, this 17th day of September, A. D., 1912.

(L. S.)

JOHN L. PRANGLIN,  
District Clerk Frio County, Texas.

Comes the International & Great Northern Rail-

way Company and joins in the foregoing petition for removal of said cause as therein prayed.

COBBS, ESKRIDGE & COBBS,  
Attorneys for I. & G. N. Ry. Co.

Endorsed: No. 1336.

Clara Hill vs. I. & G. N. Ry. Co. and The Texas & Pacific Railway Co.

Petition for Removal.

Filed the 17th day of September, A. D., 1912. John L. Pranglin, Clerk District Court, Frio County, Texas.

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### BOND FOR REMOVAL.

In the District Court of Frio County, Texas, Forty-Ninth Judicial District.

Clara Hill

vs.

No. 1336.—*Law.*

I. & G. N. and The Texas & Pacific Railway Company.

*Know All Men by These Presents:*

That the Texas & Pacific Railway Company, as principal, and H. P. Hay and C. R. Buddy, as sureties, are held and firmly bound unto Clara Hill in the penal sum of five hundred dollars, for the payment whereof, well and truly to be made, unto the said Clara Hill, his heirs and assigns, we jointly and severally bind ourselves, our successors, representatives, heirs and assign, firmly by these presents, yet upon these conditions, that:

Whereas, the said, The Texas & Pacific Railway Company, has filed its petition in the District Court of Frio County, for the removal of a certain cause

therein pending, wherein Clara Hill is plaintiff, and The Texas & Pacific Railway Company is defendant, said cause being numbered upon the docket of said Court as No. 1336 to the District Court of the United States for the Western District of Texas.

Now, therefore, if the said The Texas & Pacific Railway Company shall enter in said District Court of the United States for the Western District of Texas, a certified copy of the record in said suit within thirty days from the date of the filing of said petition, and shall pay all costs which may be awarded by said District Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, and shall there appear and enter special bail in said suit, if the same was originally requisite in said cause, then this obligation shall be void; otherwise, of full force and effect.

Witness our hands and seal, this 12th day of September, A. D., 1912.

THE TEXAS & PACIFIC RAILWAY CO.

By W. L. Hall, General Atty.

H. P. May,

C. R. Buddy.

Approved this 17th day of September, A. D., 1912.

J. F. MULLALLY,

Judge District Court, Forty-ninth Judicial District.

United States of America,  
Northern District of Texas—ss.

I, Louis C. Maynard, Clerk of the United States District Court for the Northern District of Texas, do hereby certify that I have examined the within bond, and that the sureties whose names are signed thereto are each worth more than the amount named in said bond over and above all exemptions and liabil-



ities and that I would approve the same were same presented to me for approval.

Given under my hand and seal of said United States District Court this 12th day of September, A. D., 1912.

LOUIS C. MAYNARD,  
Clerk U. S. District Court.

(L. S.)

Endorsed: No. 1336.

Clara Hill vs. The Texas & Pacific Railway Co.  
et al.

Bond for Removal.

Filed the 17th day of September, A. D., 1912. John  
L. Pranglin, Clerk District Court Frio County,  
Texas.

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### ORDER OF REMOVAL.

Clara Hill  
vs. No. 1336.  
I. & G. N. Ry. Co. and The Texas & Pacific Railway  
Company.

This cause coming on this day to be heard, upon the petition and bond of The Texas & Pacific Railway Company, to remove same to the District Court of the United States for the Western District of Texas, said petition being heard by the court, and it appearing to the court that written notice of said petition and bond was given to the adverse party prior to the filing same, that a good and sufficient bond has been filed, and that said petition shows proper grounds for removal, the prayer of the said The Texas & Pacific Railway Company is granted and its bond approved, and this cause ordered removed to the District Court of the United States for the Western

District of Texas at San Antonio, Texas. And the Clerk of this Court will make out a transcript of the record in this cause, to be filed in the United States Court for the said District of Texas.

Endorsed: No. 1336.

Clara Hill vs. I. & G. N. Ry. Co. and The Texas & Pacific Railway Co.

Order of Removal.

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### BILL OF COSTS.

#### Clerk's Fees.

Docketing cause .....	\$ .20
Issuing three writs and copies.....	3.75
One certified copy petition.....	2.00
Filed six papers .....	.60
Entering three appearances.....	.45
Final judgment .....	1.00
1 Certificate with seal.....	.50
Transcript 4,160 words .....	8.30
Cost and copy.....	.25
	<hr/>
	\$17.05

#### Sheriff's Fees.

Executing two citations .....	\$ 1.50
Executing one citation .....	2.45
Jury fee .....	.50
	<hr/>
	\$ 4.45

#### Recapitulation.

Clerk's fees .....	\$17.05
Sheriff's fees .....	4.45
Jury fees (pd. by plff.).....	0.00
Stenographer's fees .....	0.00
	<hr/>
	\$21.50

The State of Texas, County of Frio.

I, John L. Pranglin, Clerk of the District Court, in and for Frio County, Texas, do hereby certify that the foregoing eighteen (18) pages contains a true and correct copy of the papers in the case of Clara Hill vs. No. 1336, I. & G. N. Ry. Co. et al, as the same appear of record on file with the papers in the cause. Given under my hand and seal of office this the 24th day of September, A. D., 1912.

(Seal.)

JOHN L. PRANGLIN,

Clerk District Court, Frio County, Texas.

By Robert Hudson, Deputy.

Endorsed: No. 182 Law.

Clara Hill vs. International & Great Northern Ry. and the Texas & Pacific Railway Co.

Transcript of Record from Frio County District Court.

Filed October 14, 1912, at 5 o'clock p. m. D. H. Hart, Clerk. By A. I. Campbell, Deputy.

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### ANSWER OF DEFENDANT.

In the District Court of the United States for the Western District of Texas, at San Antonio, Texas.

Clara Hill

vs.

No. 182.

International & Great Northern Railway Company  
and The Texas & Pacific Railway Company.

Now comes the defendant, The Texas & Pacific Railway Company, upon whose application joined in

by the other defendant, this cause was removed from the District Court of Frio County, Texas, to this Honorable Court, and respectfully alleges that in case the plea in abatement heretofore filed by the other defendant herein be sustained, that thereupon this defendant desires to and here now shows to the Court that it had no agent or representative in Frio County, Texas, when this cause of action accrued, nor when this suit was filed, and that its line of railway runs from Texarkana, via Marshall, Dallas, Fort Worth, Abilene, Big Springs on to El Paso, Texas, several hundred miles north of Frio county and that no part of its line traverses Frio county and that the action is alleged and the personal injury occasioned to have occurred in Cass County, Texas.

Wherefore, the defendant, The Texas & Pacific Railway Company, prays that the suit abate as to it.

W. T. ARMISTEAD,  
Attorney for The Texas & Pacific Railway Company,  
Defendant.

And further the said defendant, The Texas & Pacific Railway Company, says under oath that it was not and is not now nor at the time this suit was instituted a co-partner of the International & Great Northern Railway Company and of this fact it puts itself upon the country and prays judgment.

W. T. ARMISTEAD,  
Attorney for The Texas & Pacific Railway Company,  
Defendant.

And in case the foregoing pleas are overruled by the Court the defendant, The Texas & Pacific Railway Company, demurs to the plaintiff's petition and

says the same is insufficient in law of which it prays judgment.

W. T. ARMISTEAD,  
Attorney for The Texas & Pacific Railway Company,  
Defendant.

And in case the same is overruled by the Court the defendant, The Texas & Pacific Railway Company, denies each and every allegation in the plaintiff's petition contained, and says it is not guilty of the wrongs, injuries and trespasses therein alleged against it and puts itself upon the country.

And specially answering herein the said defendant, The Texas & Pacific Railway Company, shows to the Court that the plaintiff after the accident complained of went on her journey apparently unhurt and in as good condition as before the accident; that before the accident she appeared in worse condition physically than she did a few days thereafter when she returned to her home at Pearsall, Texas; that she delayed bringing her suit for personal injuries for nearly two years and by her conduct leads this defendant to believe and it here charges the fact to be that she was and is malingering; that if she had the two operations performed as alleged from hurts received in the accidents that the same was malpractice in which she acquiesced; that the coach in which she was riding was not derailed at the time of the accident and there was no occasion for her in that coach to have been hurt or even jarred any more than is usual and necessary in the operation of defendant's train.

The defendant admits that the locomotive pulling the train upon which the plaintiff claims to have been hurt did get off the track or rather run into a switch on a side track unexpectedly as the switch was set for the side track instead of the main line by some

party unknown to this defendant and without any fault or negligence on its part, but that the said locomotive was five or six car lengths ahead of the coach in which the plaintiff claims to have been riding.

Wherefore the defendant, The Texas & Pacific Railway Company, prays for judgment and costs and general relief.

W. T. ARMISTEAD,  
Attorneys for the Defendant, The Texas & Pacific  
Railway Company.

Endorsed: No. 182 Law.

In the District Court of the United States for the  
Western District of Texas at San Antonio.

Clara Hill, plaintiff, vs. International & Great  
Northern R. Co. and the Texas & Pacific Ry. Co.,  
defendants.

Pleas, Demurrer and Answer of defendant T. &  
P. Ry. Co.

Filed October 14, 1912. D. H. Hart, Clerk. By  
A. J. Campbell, Deputy.

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### PLAINTIFF'S MOTION TO REMAND.

In the District Court of the United States in and for  
the Western District of Texas, at San Antonio,  
Texas.

Clara Hill

vs.

No. 182.

International & Great Northern Railway Company  
and The Texas & Pacific Railway Company.

Now comes the plaintiff in the above cause and  
moves the Court to remand this cause to the District

Court of Frio county, from whence it was removed, because this Court is without jurisdiction to hear and determine said cause.

Wherefore plaintiff prays that this cause be remanded.

MAGUS SMITH,  
H. C. CARTER,  
PERRY J. LEWIS,  
Attorneys for Plaintiff.

Endorsed: No. 182.

Clara Hill vs. I. & G. N. Ry. and T. & P. Ry.  
Plaintiff's Motion to Remand.

Filed January 3, 1913. D. H. Hart, Clerk. By  
A. I. Campbell, Deputy.

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DEFENDANTS REPLY TO MOTION TO RE-  
MAND.

In the District Court of the United States for the  
Western District of Texas, at San Antonio, Texas.

Clara Hill

vs.

No. 182.

I. & G. N. Railway Co. and T. & P. Railway Co.

Now comes the defendant, The Texas & Pacific Railway Co., and in answer to the motion to remand, filed herein, by the plaintiff, it says:

That the said motion to remand is insufficient in law and shows no sufficient cause why said suit should be remanded, notwithstanding the fact stated therein, to the effect that the suit is one arising under the constitution and laws of the United States, in this, that it is a suit against the Texas & Pacific Ry. Co.,

which is a corporation created by an act of Congress of the United States, and the statement that the defendant, Texas & Pacific Ry. Co., is an inhabitant of Dallas, Dallas County, Texas, and of the Northern District of Texas, is true, because the said suit being one arising under the laws of the United States, the defendant, the Texas & Pacific Ry. Co., is entitled to have the same removed to the Federal Court of the Western District of Texas, although the plaintiff resides in the Western District of Texas, and although the defendant, the Texas & Pacific Ry. Co. is an inhabitant of Dallas, Dallas County, Texas, and of the Northern District of Texas.

And further because its co-defendant, the International & Great Northern Railway Co., is a corporation sued herein, having a local agent in Frio county, where plaintiff is temporarily residing, but said defendant has joined in said petition for removal, and joins in this motion, contending that the case is one under the law removable, and which controversy between the parties, this Court has the sole and exclusive jurisdiction by virtue of the removal therein.

Wherefore defendants pray that said motion to remand be in all things overruled and denied.

W. T. ARMISTEAD,  
Attorney for T. & P. Ry. Co.  
COBBS, ESKRIDGE & COBBS,  
Attorneys for I. & G. N. Ry. Co.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Ry. et al.

Defendants Reply to Motion to Remand.

Filed January 6, 1913. D. H. Hart, Clerk.



ORDER OVERRULING MOTION TO REMAND.

In the United States District Court for the Western  
District of Texas, at San Antonio.

Clara Hill

vs. No. 182.—*Law.*

International & Great Northern Railway Company  
and The Texas & Pacific Railway Company.

Monday, January 6, 1913.

On this the 6th day of January, 1913, came on to be heard the above styled cause before the Court, upon the motion of the plaintiff to remand the cause to the State District Court of Frio County, Texas, ——— Judicial District; and the said motion having been heard and inquired into by the court, and the counsel for the respective parties being present and having been heard, and the said motion having been duly considered by the Court, it is the opinion of the Court that the said motion should be overruled, and it is accordingly so ordered. The costs accruing by reason of said motion will be taxed against the plaintiff.

Entered January 6, 1913, Vol. F., page 359.

Endorsed: No. 182 Law.

Clara Hill vs. International & Great Northern  
Ry. Co. and The Texas & Pacific Ry. Co.

Order Overruling Motion to Remand.

Filed January 6, 1913. D. H. Hart, Clerk. By  
A. I. Campbell, Deputy.

## MOTION TO CONTINUE.

In the District Court of the United States for the  
Western District of Texas, at San Antonio.

Clara Hill

vs.

No. 182.

Texas & Pacific Ry. Co. et al.

Now comes the Texas & Pacific Railway Company, one of the defendants herein, and moves this Court to grant a continuance of said cause for the following reasons:

This defendant represents to this Honorable Court that after said cause had been removed into this Court, the impression prevailed that this Honorable Court had passed upon a similar question involving the right of the removal on the part of the Texas & Pacific Ry. Co. at El Paso, and that this Court would very likely remand the case, though it seems from a discussion of the same with your Honor, that you had made no ruling adverse to the defendant's contention herein, and that through error you had been improperly quoted.

That this matter was held in abeyance for several days, during which time the claim department was advised not to bring its witnesses or to secure them until after the ruling of the Court on the motion to remand, and that that motion was not acted upon until the 6th day of January, 1912, of this term.

This defendant says that it has been diligent in making investigation with the view of securing the attendance of witnesses to be present on the trial of this cause. That within the last three days defendant has learned that the plaintiff in this cause was under

treatment by Dr. Magness, now a resident of Fannin county, formerly a practicing physician of Pearsall, Frio county. That defendant only learned, after diligent inquiry, of these facts and of the present residence of the said witness, within the last three days, whose residence is more than one hundred miles distant from this Court. Defendant says that it expects to prove, by the said witness, that previous to the date of said alleged injuries, December 22nd, 1911, plaintiff was under the treatment of the said physician for the complaints which it is alleged she suffered from and which necessitated an operation. That defendant had arranged, or did arrange, promptly for the said witness to come to San Antonio, but that the witness has failed to appear and is not now present, and it is too late and was too late when located, to obtain his deposition in this case.

Defendant further states that at the time of said accident there was among the passengers, a lady who is a practicing physician, Mrs. Dr. L. H. Fordham. Affiant is informed that the said witness saw this plaintiff at the time of the accident and that her testimony is material to its defense in this case, in that defendant expects to prove by her that plaintiff was not injured in the accident. That affiant learned that said witness resided at Lawrence, Arkansas, and endeavored to locate her, but is just advised that her residence at this time is in San Francisco, in the State of California, more than one hundred miles of this Court, and that defendant has not had time since it learned of this testimony, to take the deposition of said witness, and especially because of the reasons herein before stated.

Defendant further states that when advised of the accident when the plaintiff claims to have been injured, not knowing the extent of the same or the

character of injuries, or if any passengers were injured, started at once, a number of physicians to that point, among them Dr. W. A. Starke, its local surgeon at Atlanta, Texas, and Dr. Wheliss, another practicing physician at said point. That the testimony of these physicians is material to its defense. That believing the testimony of its local surgeon would be sufficient, to this Court, its local surgeon, Dr. Starke, was instructed to be present, and that defendant was advised that he would report to testify. That defendant is advised by telegram as follows: "Dr. Starke advises that he cannot leave today on account of illness in his family," and that defendant received this advice too late to arrange for the attendance of Dr. Wheliss, the other physician, or to obtain his testimony. These physicians were the ones who reached the accident before any others, and interviewed the passengers and went with the plaintiff on the train from the scene of the accident to Atlanta, where she disembarked, and will testify that she did not claim to be injured at said time; they were not called upon for treatment or medical attention, but stated at the time, that she had not been injured, and that so far as they could see, she had not been injured. Each and all of said witnesses reside more than one hundred miles from this Court and that their testimony is material to its defense.

Defendant further shows to the Court that immediately after the accident, also as soon as the suit was filed, its agents of the claim department, who have the control and management of such matters, went to the scene of the accident and to all other places that indicated a reasonable prospect of discovering facts and evidence tending to sustain a defense of this case, and made and prosecuted inquiry diligently to that end, and with due diligence pur-

sued such investigation of the case down to the present, making all reasonable efforts to discover testimony and to procure the attendance of witnesses to defend this suit. Notwithstanding such efforts and diligence, the testimony and the witnesses hereinbefore referred to and their places of residence was not discovered in time to procure their attendance or to take their depositions.

This motion is not made for delay, but that justice may be done. That this application is the first application for continuance made by this defendant.

Wherefore, for the reasons stated, this defendant prays your Honor to carefully consider the facts and circumstances stated, and those within the knowledge of the Court, and in view of the premises exercise your equitable power to grant this continuance.

W. T. ARMISTEAD,  
Attorney for Defendant.

The I. & G. N. Ry. Co. comes now and joins in this motion for a continuance.

COBBS, ESKRIDE & COBBS,  
Attorneys for I. & G. N. Ry. Co.

Now comes W. L. Chew, who being duly sworn as the agent of the T. & P. Ry. Co., says the foregoing facts as stated are true.

(Seal.)

W. L. CHEW.

Subscribed and sworn to before me on this the 9th day of January, 1913.

A. I. CAMPBELL,  
Deputy Clerk, U. S. District Court.

Endorsed: No. 182 Law.

Clara Hill vs. Texas & Pacific Ry. Co. et al.

Motion to Continue.

Filed January 9, 1913. D. H. Hart, Clerk. By A.  
I. Campbell, Deputy.

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FIRST AMENDED PLEAS DEMURRERS AND  
ANSWER OF DEFENDANT, THE INTER-  
NATIONAL & GREAT NORHERN  
RAILWAY COMPANY.

In the District Court of the United States for the  
Western District of Texas, at San Antonio, Texas.

Clara Hill

vs.

No. 182.—*Law.*

International & Great Northern Railway Company  
and The Texas & Pacific Railway Company.

Now comes the International & Great Northern Railway Company, one of the defendants herein, and, leave of the Court having been had and obtained, files this its first amended original answer in lieu of its plea and abatement filed herein on the 17th day of September, 1912, and for amendment says:

This defendant is improperly joined in this suit with the T. & P. Ry. Co. for the reason hereinafter shown, said suit being based upon the contract for the transportation of passenger, that is to say for injuries alleged to have been received by the plaintiff by reason of the alleged wrongful and negligent acts by the T. & P. Ry. Co. in Cass County near Atlanta, Texas, on or about the 22nd day of December, 1911, and said suit is not based upon any damages, loss or other cause growing out of the transportation or con-

tract in relation to the carriage of passengers, freight, baggage or other property.

That said suit shows upon its face to be based upon damages for injuries to the person of plaintiff while a passenger on the T. & P. train, and not for any loss of personal property or in respect to other property under contract for the transportation thereof, and if said suit is based upon the act approved March 13th, 1905, Twenty-ninth Legislature, pages 29 and 30, then this defendant says said act of the Legislature has no application to cases of this kind, and said act is void and inoperative for said purpose or any other purpose as fixing or attempting to fix the venue of suit for injuries done to passengers by the foreign road. That said act does not clearly express in its caption such purpose and the word passengers only occurs in the caption where the damages "Of the transportation or contract in relation to the carriage of passengers or freight, baggage or other property etcetera," and the word passenger only occurs in the body of the act in the fourth word of the first line, and never thereafter occurring in the body of said act, and said law is therefore void and of no force or effect either as an original act or as an amended act, since the same did not comply with the provisions of the law and the constitution as contained in Art. 3 thereof, and the sections of said article prescribing and setting forth the manner in which original bills should be proposed and introduced, and the amendments of any law, said act is in conflict if construed to fix venue in Frio county, with Act 1901, p. 31. (See Rev. Civ. Stats. of 1911, Arts. 1830, 25-26.)

The International & Great Northern Railway Company is a corporation organized, created and incorporated under the laws of the State of Texas, doing business in said State. That the Texas & Pacific Rail-



way Company is a railroad corporation organized and incorporated under a law of Congress with all the powers of a railroad company, organized and operating its separate railroad through the northern portion of the State of Texas, and denies that the International & Great Northern Railway Company and the Texas & Pacific Railway Company were then, or at any other time partners acting as agents of the other in making contract of transportation, having only corporate powers as the law vests them with as common carriers of passengers and freight, operating separately and independently.

That the plaintiff's petition shows on its face that plaintiff was traveling upon a ticket alleged to have been sold to her, from Pearsall to Longview, Texas, and that she was injured on or about the 22nd day of December, 1911, after she had left this defendant's line of road, alleged to have been caused by the negligence of the Texas & Pacific Railway Company, its agents or employees, by a collision of two trains on the line of the Texas & Pacific Railway Company, and not by or upon the line of the International & Great Northern Railway Company, as shown by the allegation of her said petition, and nowhere on the property or line of the road owned or operated by the International & Great Northern Railway Company, and for that and other reasons the petition shows that this said defendant is improperly joined in this case because there is no cause of action against it; and this defendant believes and charges there is no cause of action against it; and this defendant believes and charges that the said suit was filed in Frio county against both of the said defendants to secure said jurisdiction in said Court and in said county.

Wherefore for the reasons stated and because plaintiff's pleading has shown no cause of action against



this defendant, it prays to be dismissed from said cause, and said suit be hence abated as against this defendant, and of this prays the judgment of the Court.

COBBS, ESKRIDGE & COBBS,  
Attorneys for Defendant I & G. N. Ry. Co.

And now comes T. D. Cobb, one of the attorneys representing the International & Great Northern Railway Company, after having read the said allegations of said petition, doth upon oath say that the same are true as therein stated.

T. D. COBB.

Sworn to and subscribed before me the 5th day of December, A. D., 1913.

(Seal)

D. H. HART,  
Clerk U. S. Court.  
By A. I. Campbell, Deputy.  
Clerk of the District Court.

Not waiving any benefit and advantage to be gained by said foregoing pleas, but insisting thereupon, and subject thereto in case they are overruled, comes and demurs the said petition, and says that the said petition shows on its face that this defendant is not only improperly joined in said suit, but that no cause of action is set out, and pleaded, showing any liability whatever on the part of this defendant, and of which it prays the judgment of the Court, wherefore et cetera.

COBBS, ESKRIDGE & COBBS,  
Attorneys for Defendant.

In case this defendant is required to answer herein, not waiving its pleas and exception, comes and says it is not guilty of the wrongs, injuries and tres-

passes therein alleged against it, and of which it puts itself upon the country.

If required to answer further herein, the defendant adopts for its defense the matters and things set up and alleged in the answer of its co-defendant, the Texas & Pacific Railway Company.

And this defendant alleges the fact to be that if plaintiff be injured, all of which it denies, then the said plaintiff was injured by the Texas & Pacific Railway Company, and not through the fault and negligence or want of care of this defendant, for she was neither upon the coach or train operated by its employees, not being in charge of any agent or servant of this defendant.

Wherefore this defendant prays the judgment of this Court for its costs.

COBBS, ESKRIDGE & COBBS,  
Attorneys for International & Great Northern Ry.  
Company.

Endorsed: No. 182 Law.

Clara Hill vs. International & Great Northern Ry.  
Co. and The Texas & Pacific Ry. Co.

First Amended Pleas, Demurrers and Answer of  
Defendant, The International & Great Northern Ry.  
Co.

Filed May 5th, 1913. D. H. Hart, Clerk. By A.  
I. Campbell, Deputy.

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DEFENDANT, TEXAS & PACIFIC RY. CO.'S  
FIRST AMENDED ORIGINAL ANSWER.

In the District Court of the United States for the  
Western District of Texas, at San Antonio, Texas.

Clara Hill

vs.

No. C. L. 182.

International & Great Northern Railway Company  
and the Texas & Pacific Railway Company.

Leave of the Court having been had and obtained, this defendant now amends its answer filed in this cause on the 14th day of October, 1912, and for amendment saith:

Now comes the defendant, the Texas & Pacific Railway Company, upon whose application joined in by the other defendant, this cause was removed from the District Court of Frio County, Texas, to this Honorable Court, and respectfully alleges that in case the plea in abatement heretofore filed by the other defendant herein be sustained that thereupon this defendant desires to and here and now shows to the Court that it had no agent or representative in Frio County, Texas, and that its line of railway runs from Texarkana, via Marshall, Dallas, when this cause of action accrued, nor when this suit was filed Ft. Worth, Abilene, Big Springs on to El Paso, Texas, several hundred miles north of Frio county and that no part of its line traverses Frio county and that action is alleged and the personal injury occasioned to have occurred in Cass County, Texas.

Wherefore, the defendant, the Texas & Pacific Railway Company, prays that the suit abate as to it.

W. T. ARMISTEAD,

Attorney for the Texas & Pacific Railway Company,  
Defendant.

And further the said defendant, The Texas & Pacific Railway Company, says under oath that it was not and is not now nor at the time this suit was instituted a co-partner of the International & Great

Northern Railway Company and of this fact it puts itself upon the country and prays judgment.

W. T. ARMISTEAD,  
Attorney for the Texas & Pacific Railway Company,  
Defendant.

Sworn to and subscribed before me by W. T. Armistead, said attorney of record, this the 10th day of May, A. D., 1913.

(Seal)

D. H. HART,  
U. S. District Clerk.  
By A. I. Campbell, Deputy.  
Clerk of the U. S. District Court for the Western  
District of Texas.

And in case the foregoing pleas are overruled by the Court the defendant, the Texas & Pacific Railway Company, demurs to the plaintiff's petition and says the same is insufficient in law of which it prays judgment.

W. T. ARMISTEAD,  
Attorney for the Texas & Pacific Railway Company,  
Defendant.

And in case the same is overruled by the Court, the defendant, The Texas & Pacific Railway Company, denies each and every allegation in the plaintiff's petition contained, and says it is not guilty of the wrongs, injuries and trespasses therein alleged against it and puts itself upon the country.

And specially answering herein the said defendant, The Texas & Pacific Railway Company, shows to the Court that the plaintiff after the accident complained of, went on her journey apparently unhurt and in as good condition as before the accident; that before the accident she appeared in worse condition physically than she did thereafter; that she delayed bringing

her suit for personal injuries for nearly two years and by her conduct leads this defendant to believe, and it here charges the fact to be, that she was and is malingering; that if she had the two operations performed as alleged from hurts received in the accident, that the same was malpractice or wholly unnecessary, in which she acquiesced; that the coach in which she was riding was not derailed at the time of the accident and there was no occasion for her in that coach to have been hurt or even jarred any more than is usual and necessary in the operation of defendant's train, and no other person riding in said coach at that time was seriously hurt or seriously injured.

Further answering herein, this defendant alleges upon information and belief, and therefore charges the fact to be, that prior to the date of the alleged injury, that the said plaintiff was not a well nor healthy woman; that she had been under treatment for female trouble of some kind, unknown to this defendant but wholly within her knowledge, that required the taking of medicines both internally and externally and had been under the treatment for such troubles prior to date of alleged accident, using and taking various kinds of patented medicines and otherwise, for such troubles, both internally and by local application.

Defendant further represents that the treatment that plaintiff had, and constant insistence and persuasion of others, had the psychological effect upon the plaintiff so that she was induced, and did see different and various doctors and that she was thereby impressed by the said doctors and her kin, that she had cause of action against the Texas & Pacific Railway Co. that would produce a large amount of money in a suit for damages, so that this defendant says that whatever complaint and of whatever char-

acter or nature it was, was had by said plaintiff before the said alleged accident, and on account of her condition and persuasions as they brought to bear upon her, she was induced to submit to the operation that was had upon her and such operation was wholly unnecessary, or if necessary it was on account of plaintiff's condition prior to the time when the operation was made upon her. That the accident of which she complains as the cause of her injury was not the cause thereof, and if she is now permanently injured in any way by reason of such operation by the doctors of her own selection, such operation was both on her account and that of her physicians' negligence and the proximate cause of her injury, which resulted from conditions that existed theretofore, which affected plaintiff's health prior to the date of the alleged injury, claimed to have been received on the railroad. And insofar as any injury done to her by reason of such alleged accident, she being sick at the time, had entirely recovered therefrom, and such injuries, if any, had been entirely relieved and her condition alleged by her was brought about by reason of her own prior condition and her acts and conduct thereafter, and any injury resulting from the operation and condition would not have occurred except for the result following her negligence in having said operation, which no person of ordinary care and prudence would have undergone, and notwithstanding the alleged act of negligence by the railway company, the present injury is not the direct and immediate result of said act following a natural and unbroken sequence, and therefore the railway company is not guilty of any negligence resulting from her alleged injuries which were the proximate result of said alleged accident of defendant's train of cars, but was on account of her own carelessness and want

of care in allowing said operation to take place, which was the proximate cause of her injury.

The defendant further answering alleges that the plaintiff was in poor health at the time of the accident complained of and had been for a long time and that she had recovered from any and all injuries, if any, she received in or caused by the railway accident, and that the operation when performed was caused by and was the natural sequence of the disease she was suffering from before the accident, for the consequences of which the defendant is in no way liable and prays for judgment and costs.

The defendant admits that the locomotive pulling the train upon which the plaintiff claims to have been hurt did get off the track or rather run into a switch on a side track unexpectedly as the switch was set for the side track instead of the main line by some party unknown to this defendant and without any fault or negligence on its part but that the said locomotive was five or six car lengths ahead of the coach in which the plaintiff claims to have been riding.

Wherefore, the defendant, The Texas & Pacific Railway Company, prays for judgment and costs and general relief.

W. T. ARMISTEAD,  
Attorney for the Defendant, The Texas & Pacific  
Railway Company.

Endorsed: No. C. L. 182.

Clara Hill vs. I. & G. N. Railway Co. and T. & P.  
Ry. Co.

Defendant, Texas & Pacific Ry. Co.'s First Amended Original Answer.

Filed May 10th, 1913. D. H. Hart, Clerk. By A.  
I. Campbell, Deputy.



DEFENDANT'S MOTION FOR A POSTPONE-  
MENT.

In the United States District Court for the Western  
District of Texas, at San Antonio.

Clara Hill

vs.

No. 182.—*Law.*

Texas & Pacific Ry. Co. et al.

Now comes the defendant, the Texas & Pacific Railway Co., and pleading surprise moves the Court to continue this cause for the term, or to postpone same to a later date in this term, for the following reasons, to-wit:

That heretofore, to-wit: on the 13th day of May, 1913, this cause was peremptorily called for trial and thereupon both plaintiff and defendants announced ready and the jury was selected and the trial begun. That the first witness placed upon the stand was the plaintiff, Miss Clara Hill, herself. That she was kept upon the stand on direct examination until the noon hour of Tuesday, May the 13th; that after noon she was replaced upon the stand as a witness for herself and continued to testify on direct examination for some time, when cross-examination of said witness was begun and continued for a long period. That then a redirect examination was made which lasted for a considerable length of time. That, though plaintiff was on the stand in her own behalf and examined both direct and re-direct by her attorney for a long period of time, none of the matters hereinafter referred to were brought out by her testimony.

This defendant would further show to the Court that it is the undisputed evidence in this case that the plaintiff, Clara Hill, was, on or about the ———



day of January, 1912, taken by her attending physician to a sanitarium in Texarkana, Arkansas, which said sanitarium was and is operated by Dr. — Dale. That she remained there for a period of — days; that while there, she complained of no symptoms that even remotely indicated that she was suffering from the troubles for which she was subsequently operated. That Dr. Dale kept her under proper care and treatment and close inspection, and made thorough examinations and found no trouble to exist which might be remotely considered as of sufficient gravity to require an operation such as the undisputed testimony shows was made a few months thereafter. That the said Miss Clara Hill was discharged from said hospital in a very much improved condition; that she was able to walk about the hospital building and the lawn adjacent thereto; that she gained in weight and that the prognosis was favorable. That all of this evidence was given by Dr. Dale, whose patient the plaintiff was. That by reason of these facts and of the said plaintiff having been a patient in the sanitarium of Dr. Dale, and having been treated for the period of time she was treated by him, makes the testimony of the said Dr. Dale exceedingly important to the rights of this defendant; and makes it important that said evidence should be given a fair chance to be corroborated if attacked in any way, and especially if attacked in a manner and at a time that makes such attack particularly damaging to this defendant.

This defendant would further show to the Court, and as the reasons for which a postponement of this case should be had, that on the 15th day of May, 1913, and after this defendant had announced that it rested its case, the plaintiff again went upon the stand in her own behalf, and in answer to questions pro-

pounded to her by her attorney, stated to, and in the presence of, the Court and the jury, that while she was a patient in Dr. Dale's sanitarium in Texarkana, that he, the said Dr. Dale, called her into his private office and without her consent, and to her great surprise, took advantage of her and took her in his arms and embraced her. That she was very much alarmed at this action and cried and wept bitterly. That upon the said plaintiff leaving the stand, this defendant caused the said Dr. Dale to again go upon the stand for the purpose of making a statement. That the said Dr. Dale declared that the statements made by the plaintiff were wholly false and untrue, and further stated that he felt that his reputation was at stake and desired to be as emphatic as possible.

This defendant further says to the Court that the undisputed testimony shows that shortly after the return of the plaintiff herein, from the sanitarium of Dr. Dale at Texarkana, that its claim agent, Mr. W. L. Chew, went to the town of Queen City at the instance and upon the written request of this plaintiff, and at various times thereafter visited the plaintiff at her request, in an effort to settle and adjust this case, and that the said plaintiff did not at any time intimate to this defendant's said claim agent that Dr. Dale had been guilty of any improper conduct toward her. That if any such alleged fact had been even remotely intimated to this defendant's said agent, that same would have been promptly and thoroughly investigated, but coming as it now does at the "eleventh hour," renders it impossible for this defendant to make such investigation and to prepare to properly meet the evidence given by the said plaintiff the last time she was upon the stand, and makes it impossible for this defendant to proceed at this time to the closing of this case and properly present same to the

jury, and that if required to close that same will operate to the disadvantage of said defendant, and if said evidence by the plaintiff is permitted to stand without further investigation and contradiction, and permitted to go to the jury in its present condition, will inflame the minds of said jury and tend to cause, and this defendant believes will cause, the rendition of a grossly excessive verdict. That the undisputed testimony shows that the plaintiff remained in the hospital of Dr. Dale a week or ten days after this alleged misconduct and further shows that the plaintiff did not speak of said alleged misconduct to any one, and that she never referred to it or told any one of it, except her mother, until within the last few days when she advised her lawyers. That she did not even tell her mother when she came for plaintiff at Texarakan but only when it was suggested that she return to Texarkana and to the hospital.

That this defendant then and there, and before either side had closed, stated to the Court that the attack coming at the time it did, could not but have a tendency to inflame the minds of the jurors and cause the jury trying said cause, to probably render a verdict in such sum as that it would be excessive, and then and there requested the Court that this case be postponed a sufficient length of time to give this defendant an opportunity to bring witnesses from Texarkana, the home of the said Dr. Dale, that they might testify as to the character, standing and reputation of the said Dr. Dale, in his home and among his own people. That thereupon, defendant further requested time within which to reduce to writing its motion for a postponement of said cause, which said time was granted.

This defendant now says that to permit the testimony to stand as it is can serve only to inflame the

minds of the jurors trying this case, and will have a strong tendency to cause the jury to render an excessive verdict, and this defendant should be given an opportunity to prove to the jury the character and reputation of its said witness, Dr. Dale. And this defendant further says to this Court that it will proceed at once to produce such evidence and will have the witnesses before this Court as expeditiously as they may be brought under the facilities of rapid communication and transit that are available.

Premises considered, defendant prays this Honorable Court to postpone this cause and give this defendant such time as the Court may find is proper within which to make proof hereinabove referred to.

W. T. ARMISTEAD,  
COBBS, ESKRIDGE & COBB,  
Attorneys for Texas & Pacific Ry. Co.

Endorsed: No. 182 Law.

Clara Hill vs. Texas & Pacific Ry. Co. et al.

Defendant's Motion for a Postponement.

Filed May 15th, 1913. D. H. Hart, Clerk. By A.  
I. Campbell, Deputy.

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ORDER OVERRULING MOTION FOR A CONTINUANCE.

In the District Court of the United States in and for  
the Western District of Texas, at San Antonio.

May 15th, 1913.

Clara Hill

vs.

No. 182.—Law.

Texas & Pacific Railway Company, et al.

Now on this day came on to be heard before the Court, the motion of the defendant, the Texas & Pacific Railway Company, to continue this cause for the term or to postpone the same to a later date of the present term for the reasons stated at length in said motion, and the same having been heard by the Court, and duly considered, it is the opinion of the Court that the said motion should be in all things overruled, and it is accordingly so ordered, to which ruling of the Court, the defendant, Texas & Pacific Railway Company, in open Court excepted.

Vol. F., p. 478.

Endorsed: No. 182 Law.

Clara Hill vs. Texas & Pacific Railway Company,  
et al.

Order Overruling Motion for a Continuance.

Filed May 15th, 1913. D. H. Hart, Clerk. By A.  
I. Campbell, Deputy Clerk.

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### CHARGE OF THE COURT.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

No. 182.—*Law.*

The I. & G. N. Ry. Company and The T. & P. Ry. Co.

*Gentlemen of the Jury:*

1. In this case I charge you that the evidence has not developed any liability on the part of the defendant, International & Great Northern Railway Company, and I therefore charge you that you must return a verdict for this company, and proceed to consider the

case against The Texas & Pacific Railway Company, under the following instructions:

2. The evidence shows that there was a collision between two of the Texas & Pacific Railway Company's trains, and that the plaintiff was a passenger upon one of said trains. If you believe from the evidence that the plaintiff directly received any of the injuries alleged in her petition by reason of said collision, then I charge you that your verdict must be for the plaintiff in such a sum as will fairly compensate her for any such injuries as were received and as set forth and claimed by her in her petition; and in assessing damages you should take into consideration the reasonable expenses which the plaintiff has incurred for drugs, hospital services, and medical and surgical treatment, which you may find were reasonably necessary in the proper treatment of any injuries which you may find she received. In estimating such damages, you will also take into consideration the mental and physical suffering, if any, which the plaintiff has undergone by reason of any such injuries; and if you find that any such injuries are permanent, you should also consider any mental and physical suffering which any such injuries will produce upon plaintiff in the future. And if you find that any such injuries are permanent, and that they will diminish the plaintiff's capacity to labor and earn money in the future, then I charge you that this element of damage also should be considered.

3. In this case the defendants charge that the operation and removal of the plaintiff's ovaries was unnecessary, and that the surgeon who performed said operation was guilty of mal-practice. In this connection I charge you that the plaintiff would not be responsible for the errors or mistakes of the surgeon who performed the operation, provided she used ordi-

nary care in the selection of a reasonably competent surgeon, and did select a reasonably competent surgeon, and submitted her case to his judgment. If you find from the evidence that the plaintiff received hurts in said collision which led to the injury and impairment of her ovaries, and if you further find that she used ordinary care in the selection of a reasonably competent surgeon, that is, such care as a person of ordinary prudence would have exercised under similar circumstances, and did employ a reasonably competent surgeon to perform said operation, and that he, acting upon his judgment, removed her ovaries, then I charge you that the defendant would be liable for the condition produced by reason of said ovaries being removed, notwithstanding some other course pursued by the surgeon might have saved the removal of her ovaries.

4. The defendant charges that the plaintiff is malingering—that is to say, that she is not really injured as she claims to be, but is pretending to be so injured in order to recover a judgment against the defendant for damages to which she is not entitled. Whether the plaintiff was really hurt in the collision before mentioned, or whether she is malingering, is a question which is submitted to you to be determined from a consideration of all the facts and circumstances in evidence. Should you find that the plaintiff was not injured in said collision, then your verdict should be in favor of the Texas & Pacific Railway Company. You are the exclusive judges of the credibility of the witnesses and of the weight to be attached to their testimony, and you will give it such weight as you deem it entitled to receive under all the circumstances of the case.

5. If your verdict be in favor of the plaintiff you will return it in the following form: “We, the jury,



find for the plaintiff against the Texas & Pacific Railway Company, and assess her damages at \_\_\_\_\_ dollars, (you to fill in the blank with the amount which you award her); and we further find in favor of the defendant, International & Great Northern Railway Company."

6. If, on the other hand, your verdict should be for the defendants you should simply say: "We, the jury, find for both defendants."

T. S. MAXEY,  
Judge.

Endorsed: No. 182.

Clara Hill vs. I. & G. N. Railway Co. and the T.  
& P. Railway Co.

Charge of the Court.

Filed May 16th, 1913. D. H. Hart, Clerk .

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SPECIAL CHARGE NO 3 REQUESTED BY  
DEFENDANT.

In the United States District Court, San Antonio,  
Texas.

Clara Hill

vs.

I. & G. N. Ry. Co. et al.

Defendants request the Court to charge the jury that if they believe the train upon which plaintiff claims to have been hurt did get off the track or rather run into a switch on a side track unexpectedly, as the switch was set for the side track instead of the main line by some party unknown to the defendant



and without any fault or negligence on its part, then you will find for the defendant.

Special charge No. 3 requested by defendant, T. & P. Ry. Co.

W. T. ARMISTEAD,  
Attorney for Defendant T. & P. Ry. Co.  
Refused.

T. S. MAXEY,  
Judge.

No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and the T. & P. Railway Co.

Special Charge No. 3 Requested by Defendant, T. & P. Ry Co. (Refused).

Filed May 16th, 1913. D. H. Hart, Clerk. By A. I. Campbell, Deputy:

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SPECIAL CHARGE NO. 2 REQUESTED BY  
DEFENDANTS.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

The I. & G. N. Ry. Co. and T. & P. Ry. Company.  
Defendant's Requested Charge No. 2.

Now comes the Texas & Pacific Railway Company, one of the defendants herein, and requests the Court to charge the jury as follows:

*Gentlemen of the Jury:*

If under the instructions herein given you, you find for the defendant, the International & Great Northern Railway Company, I further charge you that you cannot find for the plaintiff against the Texas & Pacific Railway Company, and you will so find.

Special Charge No. 2 requested by

W. T. ARMISTEAD,  
Attorney for T. & P. Ry. Co.

Refused.

T. S. MAXEY,  
Judge.

Endorsed: No. 182.

Clara Hill vs. I. & G. N. Ry. Co. and Texas & Pacific Ry. Co.

Special Charge Requested by Defendants No. 2.  
(Refused).

Filed May 16th, 1913. D. H. Hart, Clerk.

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SPECIAL CHARGE NO. 5.

Defendants Requested Charge No. 5.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

I. & G. N. Railway Company and T. & P. Railway Co.

The defendant asks the Court to charge the jury  
as follows:

*Gentlemen of the Jury:*

If you believe from the evidence that the plaintiff had the operation performed, as alleged, on account of hurts received in the accident, you cannot consider any injury that came to her from the same unless it came as a result from the shock received in said train or from concussion, there being no allegation in plaintiff's pleading that the injury was received in any other way; and in considering the injuries received from them or from the collision, you will disregard every element of injury that could flow entirely from traumatism, that is, a blow of some kind.

W. T. ARMISTEAD,  
COBBS, ESKRIDGE & COBBS,  
Attorneys for Defendants.

Refused.

T. S. MAXEY,  
Judge.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Company and the  
T. & P. Ry. Co.

Special Charge No. 5. Requested by the Defendants. Refused.

Filed May 16th, 1913. D. H. Hart, Clerk. By A.  
I. Campbell, Deputy.

SPECIAL CHARGE NO. 9.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

No. 182.—*Law.*

The I. & G. N. Ry. Company and the T. & P. Railway  
Company.

Defendant's Requested Charge No. 9.

The defendant requests the Court to charge the  
jury as follows:

*Gentlemen of the Jury:*

You are instructed that if you believe from the evidence that at the time the plaintiff was operated upon that she was a neurasthenic and was suffering from neurasthenia, and that she was influenced to submit herself to the surgical operation when it was not necessary and when other treatment would have entirely cured and relieved her, and that she did not use and exercise ordinary care, and such want of care, if you believe she did not exercise proper care, caused her to select a doctor when it was not necessary, and that her act contributed to the injury, then the railroad company would not be responsible in damages for the consequences of the operation that was performed upon her; and you will, in summing up the amount of damages you find she was entitled to, if any, not consider the operation upon her and the removal of any of her organs in finding a judgment and assessing damages against the defendant, but will

only assess such damages as arose from the injury otherwise than as hereinabove instructed.

W. T. ARMISTEAD,  
COBBS, ESKRIDGE & COBBS,  
Attorneys for Defendants.

Refused.

T. S. MAXEY,  
Judge.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and the T. & P. Railway Co.

Special Charge No. 9. Requested by the Defendants. Refused.

Filed May 16th, 1913. D. H. Hart, Clerk. By A. I. Campbell, Deputy.

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SPECIAL CHARGE NO. 6 REQUESTED BY  
DEFENDANTS. REFUSED.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

No. 182.—Law.

I. & G. N. Railway Co. and T. & P. Railway Co.  
Defendant's Requested Charge No. 6.

The defendant requests the Court to charge the jury as follows:

*Gentlemen of the Jury:*

If you believe that the plaintiff's condition as alleged by her, was brought about by reason of her prior

condition and her acts and conduct thereafter, and any injuries resulting from the operation, and the others would not have occurred except for the result of her own negligence in having said operation performed, as no person of ordinary care and prudence would have undergone, and notwithstanding the alleged act of negligence upon the part of the railroad, the present injuries are the direct and immediate result of said act, following in natural and unbroken sequence, and the railroad company was not guilty of any negligence resulting from her alleged injuries which were the proximate result of her said accident in the defendant's trains of cars, but was on account of her own carelessness and want of care in allowing said operation to take place, which was the proximate cause of her injuries, you will find for the defendant.

W. T. ARMISTEAD,  
COBBS, ESKRIDGE & COBBS,  
Attorneys for Defendants.

Refused.

T. S. MAXEY,  
Judge.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and the T. & P. Railway Co.

Special Charge No. 6. Requested by the Defendants. Refused.

Filed May 16, 1913. D. H. Hart, Clerk. By A. I. Campbell, Deputy.

SPECIAL CHARGE NO. 1.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

No. 182.—*Law*.

The I. & G. N. Ry. Co. and the T. & P. Ry. Co.

The defendant requests the Court to charge the  
jury as follows:

*Gentlemen of the Jury:*

You are instructed that under the evidence you will  
find a verdict for the defendant, because such injuries  
as plaintiff sues for could not be and were not the  
direct and proximate cause of the collision and shock,  
if any, to plaintiff.

W. T. ARMISTEAD,  
.. COBBS, ESKRIDGE & COBBS,  
Attorneys for Defendants.

Refused.

T. S. MAXEY,  
Judge.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and the T.  
& P. Railway Co.

Special Charge No. 1. Requested by Defendants.  
Refused.

Filed May 16th, 1913. D. H. Hart, Clerk. By A.  
I. Campbell, Deputy.

SPECIAL CHARGE.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

No. 182.—*Law*.

I. & G. N. Railway Co. and T. & P. Railway Co.  
Defendant's Requested Charge No. —.

The defendant requests the Court to charge the  
jury as follows:

*Gentlemen:*

If you believe that in so far as any injury done to  
the plaintiff by reason of such alleged accident she  
had entirely recovered therefrom before the operation  
and such injuries, if any, had been entirely relieved,  
you will find for the defendant.

W. T. ARMISTEAD,  
COBBS, ESKRIDGE & COBBS,  
Attorneys for Defendants.

Given.

T. S. MAXEY,  
Judge.

Endorsed: No. 182.

Clara Hill vs. I. & G. N. Ry. Co. et al.

Special Charge Requested by the Defendants.  
Given.

Filed May 16th, 1913. D. H. Hart, Clerk.



SPECIAL CHARGE No. —.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

No. 182.

I. & G. N. Ry. Co. and the T. & P. Ry. Company.  
Defendant's Requested Charge No. —.

The defendant requests the Court to charge the  
jury as follows:

*Gentlemen of the Jury:*

If you believe that the injuries received by plaintiff  
were not the direct and proximate result of the rail-  
road accident, then you will find for the defendant.

W. T. ARMISTEAD,  
COBBS, ESKRIGDE & COBBS,  
Attorneys for Defendants.

Given.

T. S. MAXEY,  
Judge.

No. 182 Law.

Clara Hill vs. I. & G. N. Railway Company and  
the T. & P. Ry. Co.

Special Charge No. —. Requested by the Defend-  
ants. Given.

Filed May 16, 1913. D. H. Hart, Clerk.

SPECIAL CHARGE NO. —.

The United States District Court, Western District  
of Texas, San Antonio Division. .

Clara Hill

vs.

No. 182.—*Law.*

I. & G. N. Ry. Co. and the Texas & Pacific Ry. Co.  
Defendant's Requested Charge No. —.

*Gentlemen of the Jury:*

I further charge you that you will not consider any damages or any condition of the plaintiff that arose after the accident, unless you find from a preponderance of the evidence that she received such injuries in the wreck or collision of the Texas & Pacific Railway trains on the 22nd day of December, 1911, or that the said injuries followed in an unbroken sequence from the injuries there received and were directly and proximately caused and produced by the hurt she received in said collision, if any.

Requested by

W. T. ARMISTEAD,

Attorney for Defendant T. & P. Ry. Co.

Given.

T. S. MAXEY,

Judge.

Endorsed: No. 182.

Clara Hill vs. I. & G. N. Ry. Co. and Texas & Pacific Ry. Co.

Special Charge Requested by Defendants. Given.  
Filed May 16th, 1913. D. H. Hart, Clerk.

VERDICT.

In the United States District Court for the Western  
District of Texas at San Antonio, Texas.

Verdict of the Jury in the case of

Clara Hill

vs.

The I. & G. N. Ry. Company and the T. & P. Ry. Co.

We, the jury, find for the plaintiff against the Texas & Pacific Railway Company and assess her damages at twenty-one thousand and five hundred (\$21,500.00) dollars; and we further find in favor of the defendant, International & Great Northern Railway Company.

H. E. HATCH,  
Foreman.

Endorsed: No. 182 Law.

Clara Hill vs. Texas & Pacific Railway Company.  
Verdict.

Filed May 16th, 1913. D. H. Hart, Clerk.

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JUDGMENT.

In the United States District Court for the Western  
District of Texas.

Clara Hill

vs.

No. 182.—*Law.*

I. & G. N. Ry. Company and the T. & P. Ry. Co.

On this, the 13th day of May, came on the above entitled cause, being duly reached and called for trial,

all parties came and announced ready on the law of the case. (The Court after having heard all pleas and all exceptions of the defendant, having considered the same and having heard the evidence thereupon, is of the opinion that none of the said pleas nor exceptions are well taken and each and every one of the same are hereby overruled, to which ruling of the Court the defendants then and there and in open Court excepted.) And thereupon came a jury of good and lawful men, to-wit: H. E. Hatch, and eleven others, who, having been duly selected, empanelled, and sworn, heard the pleadings, the evidence, and the charge of the Court, and thereafter on the 16th day of May, 1913, retired to consider of their verdict and on the same day the jury returned into open court the following verdict:

"We, the jury, find for the plaintiff against The Texas and Pacific Railway Company, and assess her damages at twenty-one thousand and five hundred (\$21,500.00) dollars; and we further find in favor of the defendant, International & Great Northern Railway Company.

"(Signed) H. E. HATCH,  
"Foreman."

Said verdict having been read to the jury, they said it was their verdict, and thereupon the Court approved said verdict and ordered it filed and judgment is now entered thereon.

It is ordered and adjudged that the plaintiff, Clara Hill, do have and recover of The Texas & Pacific Railway Company, the sum of twenty-one thousand and five hundred dollars, together with interest thereon from the 16th day of May, 1913, until paid, and together with all costs in this behalf expended, for all of which let execution issue.

It is further ordered that the plaintiff take nothing

against the defendant, International & Great Northern Railway Company, and that said company go hence without day, and recover all costs which it has expended in this cause.

It is further ordered, however, that the said execution hereinbefore directed, shall not be issued before sixty days after adjournment of this term of this Court, and it is also further ordered that the defendant shall have ninety days from and after the adjournment of this Court in which to prepare and present for approval and file its Bills of Exception.

Entered May 16, 1913, Vol. F., page 475.

Endorsed No. 182 Law.

Clara Hill vs. Texas & Pacific Railway Co. et al.  
Judgment.

Filed May 16, 1913. D. H. Hart, Clerk.

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MOTION ASKING NINETY DAYS' TIME TO  
STAY EXECUTION AND TO PREPARE  
FOR WRIT OF ERROR, BILLS OF  
EXCEPTION, ETC.

In the United States District Court for the Western  
District of Texas, at San Antonio, Texas.

Clara Hill

vs.

No. C. L. 182.

International & Great Northern Ry. Co. and Texas  
& Pacific Ry. Company.

Now comes the defendant, The Texas & Pacific Railway Co., herein, against whom judgment has been rendered in the foregoing cause, and represents

to the Court that it is its intention to take the same by Writ of Error to the United States Circuit Court of Appeals for the Eastern District, sitting in New Orleans, Louisiana, in case a new trial is not granted herein.

This defendant represents to this Honorable Court that it will require some time in which to prepare said cause for Writ of Error, as it cannot be done without securing stenographic notes and the Court having awarded to the defendant ninety days in which to prepare the same by proper Bills of Exception.

This defendant further represents that the judgment of the Court in this cause is for the sum of twenty-one thousand, five hundred (\$21,500.00) dollars, with lawful interest from the date of said judgment. It therefore prays that the execution be stayed and not awarded, and the Clerk be directed not to issue the same for at least ninety days and that no execution be issued until the time expires which your Honor has granted, that the Bills of Exception may be awarded, and your petitioner will ever pray.

W. T. ARMISTEAD,  
COBBS, ESKRIDGE & COBBS,  
Attorneys for Texas & Pacific Ry. Co.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Ry. Co. and Texas & Pacific Railway Co.

Motion Asking Ninety Days' Time to Stay Execution and to Prepare for Writ of Error, Bills of Exception, etc.

Filed May 19th, 1913. D. H. Clark, Clerk. By A. I. Campbell, Deputy.

## MOTION FOR NEW TRIAL.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

No. 182.—*Law.*

The I. & G. N. Railway Co. and The Texas & Pacific  
Railway Co.

Now comes the defendant herein, the Texas & Pacific Railway Company, and moves the Court to set aside the verdict in the above stated cause and grant it a new trial for the following reasons, to-wit:

### I.

Because the Court erred in not considering and in not sustaining the defendant's plea to the jurisdiction of this Court, for this, that the cause was improperly filed in the District Court of Frio county, as this defendant neither had an agent nor line of railway in that county, the plaintiff then and there in open Court conceding the facts and admitting there was no expectation to recover from the I. & G. N. Railway Co. and would ask in the progress of the case, no judgment against said company, and said suit being for an alleged tort, wholly committed by the Texas & Pacific Railway Co. out of this district, there was no venue against this defendant in Frio county, defendant's residence and domicile being in Dallas County, Texas, and not in Frio county, nor having any local agent there.

### II.

Because the Court erred in overruling the pleas of the defendant and also in not submitting the ques-

tion of partnership to the jury and in instructing the jury to find in favor of the International & Great Northern Railway Co., the plaintiff having alleged the two defendants were partners, without submitting that issue to the jury, but taking that issue from the jury and instructing a verdict in favor of the International & Great Northern Railway Co. without, at the same time, instructing a verdict for the Texas & Pacific Railway Co., for this, the plaintiff instituted suit in Frio county under the provisions of the act approved March 13th, 1905, which has the following proviso to Section 1 of said Act, to-wit:

“Provided, however, that if damages be recovered in such suits against more than one defendant, not partners in such carriage transportation or contract, the same shall on the request of either party, be apportioned between the defendants by the verdict of the jury, or if no jury is demanded, then by the judgment of the Court.”

Therefore, if said law is a valid law, which is denied, providing venue in such suits, then it was proper for the purpose of apportioning the damages, if any, between the said road for both to remain in the case, and hence error to instruct a verdict in favor of one defendant without instructing a verdict for the co-defendant.

### III.

The Court erred in not giving Special Charge No. 2, to the effect that if the jury find for the I. & G. N. Railway Co. under the Court's charge, they should then find for the Texas & Pacific Railway Company.



IV.

The Court erred in discharging over the objections of the defendant, two qualified jurors, to-wit: J. G. Lentz and J. M. Vance, both of them being large property holders in San Antonio and in every respect splendidly qualified jurors, because said jurors were opposed to "fake damage suit cases," and did not disqualify themselves by any statement made by them, as shown by the language contained in their examination in the Bill of Exceptions taken by the said defendant when said jurors were examined and tested as to their qualification. Both are business men of means and fairness and among the best citizens in San Antonio, and answered in respect to "fake" cases as any honest, fair man should have answered.

V.

The Court erred in its General Charge to the jury as shown by the specific objections, Nos. 1 to 6 inclusive, taken by the defendant at the time, when the Court delivered said charge to the jury and embraced in the Bill of Exceptions.

Among such errors in the General Charge of the Court was instructing the jury that the plaintiff would not be responsible *for the errors and mistakes of the surgeon who performed the operation, provided she used ordinary care in the selection of a reasonably competent surgeon.*

Our contention in this connection being:

(a) Whether the particular operation was necessary was an issue for the jury, on defendant's proof, to determine and the Court should have submitted to the jury, whether or not *she* used proper care in

first ascertaining, by making preparation for the restoration of her health before selecting any surgeon to perform any such operation;

(b) Whether her condition required the operation;

(c) Whether the operation eventually was made by a doctor who removed more of the plaintiff's organs than were necessary, to restore her health;

(d) Whether she received the injury, if any, on the train, which was or was not, such as to cause the condition, stated, by the surgeon, who performed the operation, the plaintiff having alleged she received a *severe shock and concussion* and by reason thereof, her nervous system was severely shocked and injured and impaired, and did not then claim to be injured. It is nowhere alleged that she *was hurt* on account of the collision or that she received hurts in said collision, and the only injuries she received, pleaded by her, were injuries received from "*the shock and concussion*" and not by any other injury that *hurt her*. The Court's attention was called specifically to the failure of plaintiff to allege any hurt or injury other than was occasioned by a severe shock, and it was upon this petition that the cause was tried, and the Court erred in submitting any other injury than alleged for the consideration of the jury.

(e) And the Court erred in making, as the Court did, the plaintiff's cause of action on account of the operation and her recovery therefor, depend as to whether she employed "a reasonably competent surgeon to perform said operation." Refused to submit any issue as to whether she ought to have used ordinary care in relieving herself from such injuries before going under the surgeon's knife, or using ordinary care in avoiding an operation, *rather than her right to recover for the injuries done her, if she did*

*not employ "a reasonably competent surgeon to perform said operation,"* and not leaving for the jury to say whether she ought to have been operated upon or not.

(f) The Court refused to submit in its General Charge to the jury, defendant's defense that she was induced to submit to the operation, whether necessary or not, or if the operation was wholly unnecessary, or whether it was on account of plaintiff's condition prior to the time when the operation was made upon her.

(g) That the plaintiff had gotten well and recovered from the effects of the injury and that the operation upon her was not the direct and immediate result of the injury caused by the "shock or the concussion" in the alleged accident, but was on account of her own carelessness and want of care in allowing the said operation to take place, which was the proximate cause of the loss of her ovaries.

## VI.

The Court erred in not giving the charge requested by defendant, to the effect that the injuries sued for could not be, and were not, the direct and proximate cause of the collision and shock, if any, to plaintiff, as alleged in her petition.

## VII.

The Court erred in not giving Special Charge No. 3, to the effect if the switch was set for the side track instead of the main line by some party unknown to the defendant, and without any fault or negligence on its part, the jury should find for the defendant.

VIII.

The Court erred in refusing to give Special Charge No. 5 to the effect that if the jury believe from the evidence, plaintiff had the operation performed on account of hurts received in the accident, they should not consider any injury that came to her, unless it came as the result of the shock received in said train or the concussion, there being no allegation in plaintiff's pleading that the injury was received in any other way and in considering the injuries received from them, or from the collision, you will disregard every element of injury that would flow entirely from traumatism, that is a blow of some kind.

STATEMENT.

The allegations of plaintiff's pleading, setting forth the injury, are as follows and no other, to-wit:

"Plaintiff avers that by reason of said collision, the said Clara Hill was seriously and permanently injured in the following respect: (1) She received a *severe shock and concussion*, and by reason thereof her *nervous system* was *severely shocked and injured*, and impaired; that by reason of the impaired condition of her *nervous system* she is afflicted with *nervous prostration*, which makes it utterly impossible for her to perform labor of any kind; (2) that by reason of said *shock and concussion*, the said plaintiff's spine and spinal column in their entirety were *injured and impaired* to such an extent as to cause the said Clara Hill *great pain and nervous agitation*; (3) that by reason of said *shock and concussion*, her *hip and back* were *severely and permanently injured*; (4) that by reason of said *shock and concussion* her *ovaries* were so *severely injured* that it caused them

to be so *inflamed and ulcerated* that it became necessary that both be removed; (5) also the *shock to her appendix* caused the same to *become so ulcerated and infected* to that extent that it became necessary also to remove it; (6) that by reason of *said injuries to her spinal column and hip and ovaries and appendix*, she suffered and has continued to suffer great pain; (7) that the said injuries has caused her great mental and physical misery.”

### REMARKS.

The word shock is a sudden agitation of the body or mind. Haile's Curator vs. Texas & Pacific R. R. Co., 60 Fed. 557-559; 9. C. C. A. 134; 23 L. R. A. 14. Concussion, a jar of the brain substance without laceration of its tissues. Maynard vs. Oregon R. Co., 72 Pac. 590—; 43 Ore., 63. As applied to the spine, if it be admitted, such a condition may exist, is meant a condition of the spinal cord produced by a violent shock.

Under none of the allegations in the pleading can it be construed to mean by shock or concussion, that the plaintiff was injured by a blow or by being struck or hurt by a blow, such as being thrown against any hard substance, *there being no such allegation.*

### IX.

The Court erred in refusing to give Special Charge No. 6 requested, to the effect:

“If you believe that the plaintiff's condition as alleged by her, was brought about by reason of her prior condition and her acts and conduct thereafter, and any injuries resulting from the operation, and

the others would not have accrued except for the result of her own negligence in having said operation performed, as no person of ordinary care and prudence would have undergone, and notwithstanding the alleged act of negligence upon the part of the railroad, the present injuries are the direct and immediate result of said act, following in natural and unbroken sequence, and the railroad company was not guilty of any negligence resulting from her alleged injuries which were the proximate result of her said accident on the defendant's trains of cars, but was on account of her own carelessness and want of care in allowing said operation to take place, which was the proximate cause of her injuries, you will find for the defendant."

Because the issue, as contained in said charge, calling in question the negligence and want of care of plaintiff, as therein stated, was an important issue to determine in the light of plaintiff's petition and the proof as to whether or not the injury, as alleged, and the operation upon her was, or could be, the result all together of the carelessness of the railroad and in no way to be considered carelessness and want of care on her part in any particular. The testimony of the two doctors who had her specially in charge, Dr. Strawn and Dr. Dale, show that the woman was suffering from neurasthenia, a highly nervous condition, and was improving under treatment and if their testimony could be true, then the operation was not necessary to be made and she did not exercise ordinary care and prudence in taking care of herself, and to determine whether or not she could get well without an operation. Dr. Dale made a careful examination and found no trouble with her to require the operation.

X.

The Court erred in refusing to give Special Charge No. 9 requested by defendant, as follows:

“You are instructed that if you believe from the evidence that at the time the plaintiff was operated upon that she was a neurasthenic and was suffering from neurasthenia, and that she was influenced to submit herself to the surgical operation when it was not necessary and when other treatment would have entirely cured and relieved her, and that she did not use and exercise ordinary care, and such want of care, if you believe she did not exercise proper care, caused her to select a doctor when it was not necessary, and that her act contributed to the injury, then the railroad company would not be responsible in damages for the consequences of the operation that was performed upon her; and you will in summing up the amount of damages you find she was entitled to if any, not consider the operation upon her and the removal of any of her organs in finding a judgment and assessing damages against the defendant, but will only assess such damages as arose from the injury otherwise than as hereinabove instructed.”

Because if the plaintiff was a neurasthenic, as stated, and was influenced to submit herself to the surgical operation when it was not necessary, the defendant might be liable for all damages if any, done and caused to the plaintiff by reason of the alleged shock and concussion, and not be liable for any injuries caused to her by the removal of any of her organs, if the jury should believe such operation was not necessary and at the same time the plaintiff did not use proper care and caution in pursuing the treatment that was being given her at the hospital



in Texarkana, or at some like hospital in San Antonio or elsewhere, before subjecting herself to the trying ordeal, of an operation. The treatment of Miss Hill was to the effect that prior to the accident she had been taking electric bitters, and she said it "was summer time and I was working and felt tired and thought it would make me feel better." She also said she was nervous and it was also in evidence that she suffered from some female trouble. This was all prior to the accident. The testimony from the young lady herself, that she was thrown forward in the aisle and did not claim to have received any blow. She does claim some bruises between her knee and ankle and thigh and one bruise on her back. The charge was material in connection with plaintiff's own testimony and the jury ought to have had the right under a proper instruction, to determine whether or not the injury was such as to require the operation and whether or not she would have gotten well under the treatment such as was given her by Dr. Dale at his hospital in Texarkana.

## XI.

It having been injected into the trial of this cause, testimony to show that Dr. Dale was guilty of improper familiarity with this young lady, at which she became insulted and outraged, done, defendants believe, for the purpose of prejudicing the jury against Dr. Dale and his hospital and his treatment, and to destroy the value of his testimony, the Court erred in not postponing the case to enable defendant to produce before the jury testimony to show the high character and standing of Dr. Dale, and to render it impossible for him to be guilty of the implied



insult offered to the young lady, and which testimony also would be important for the simple reason that the same would also go to the weight and credibility of her own testimony, there being nurses constantly in attendance at the hospital, that gave security and protection to patients, and such testimony damaging to the extent in not only having the effect to prejudice the jury against defendant and defendant's witness, but did likewise have the effect of arousing the prejudice of the jury against the defendant and cause them to give, as they did, in this case, an outrageously excessive verdict, and if defendant had been given the time to secure and offer in connection herewith, testimony as supporting this ground of the motion, both as to its effect upon the jury as well as the testimony supporting defendant's contention that the statement in respect to Dr. Dale was wholly untrue, and supporting his good name and character and likewise going to the weight and credibility of the plaintiff's testimony, because there was a sharp conflict between the plaintiff and other witnesses, and especially attacking Dr. Dale and Dr. Strawn, the physicians who attended to her immediately after the alleged accident until she began to recover from her fright and nervousness, if she was frightened or hurt by shock or concussion in said train.

Defendant attaches the affidavits of:

Katherine Childress  
Miss Nelson  
Miss Estes

Nurses, contradicting the testimony of plaintiff. Likewise affidavits of:

John J. King  
W. L. Estes  
G. R. Grim  
Dr. J. A. Lightfoot  
Dr. R. H. T. Mann  
W. E. Casey

Most creditable citizens of Texarkana, his home, showing his high character and standing; also of Robert E. Vinson, president of the Austin Theological Seminary, Austin, Texas.

## XII.

Defendant further prays the Court if a new trial shall not be granted for the reasons herein given above, then at least the excessive verdict of \$21,500.00, should be cut down and plaintiff required to remit a large proportion thereof, as it is the result of prejudice and sympathy largely, and without any just excuse or foundation whatever, for such amount. It is large and excessive beyond all reason, showing prejudice against the defendant. As some evidence showing improper consideration of the issues and the manner of arriving at the verdict, and some previous preparation and consideration of matters not in their province, we will offer some letters and affidavits of some of said jurors, to-wit:

H. A. Kypfer  
O. E. Lacy  
Adolph Wilson  
Oliver Rose  
James Crider

that tends to show an effort to sustain their verdict in advance, and their influence by the attack on Dr. Dale by plaintiff, and the injury to defendant by such refusal of Court to postpone case to secure such testimony.

Wherefore, the defendant prays this Honorable Court to carefully consider the same and to grant it a new trial for the errors of law committed herein and on the trial of said cause, as well as for the reason that defendant did not have a fair opportunity to meet the testimony of Clara Hill concerning her treatment at the hospital by Dr. Dale, and for the further reason that said judgment is excessive beyond all reason, as well as all the other grounds set out herein, this defendant prays for a new trial and if the new trial is not granted and is overruled, then that said verdict be required to be cut down to such an amount as in the good judgment and conscience of this Honorable Court it should be done; wherefore, etc.

COBBS, ESKRIDGE & COBBS,  
Attorneys for Texas & Pacific Ry. Co.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and The  
Texas & Pacific Ry. Co.

Motion for New Trial.

Filed June 12th, 1913. D. H. Hart, Clerk. By  
A. I. Campbell, Deputy.

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AGREEMENT AS TO ENTRY OF ORDER ON  
MOTION FOR NEW TRIAL.

In the United States Circuit Court of the Western  
District of Texas.

Clara Hill  
vs.  
T. & P. Ry. Co.

In the above entitled cause, it is agreed by and between counsel for the plaintiff, Clara Hill, and the defendant, T. & P. Ry. Co., that defendant's motion for a new trial may be heard in chambers at Austin, Texas, by the Honorable Judge of this Court, and that his order upon said motion may be regularly entered of record in the minutes, when the Court is in session in San Antonio in July.

Signed this 23rd day of June, 1913.

MAGUS SMITH,

H. C. CARTER,

PERRY J. LEWIS,

Attorneys for Plaintiff.

W. T. ARMISTEAD,

COBBS, ESKRIDGE & COBBS,

Attorneys for Defendant.

Endorsed: No. 182 Law.

Clara Hill vs. Texas & Pacific Ry. Company.

Agreement as to Entry of Order on Motion for New Trial.

Filed June 25, 1913. D. H. Hart, Clerk.

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ORDER OVERRULING MOTION FOR NEW  
TRIAL AND FIXING WRIT OF ERROR  
BOND SUM OF \$25,000.00.

Clara Hill

vs.

No. 182.—Law.

Texas and Pacific Ry. Co.

Tuesday, July 8th, 1913.

On this the 8th day of July, 1913, came on to be heard before the Court the motion of the defendant,

Texas & Pacific Railway Company, to set aside the verdict and judgment heretofore rendered and entered herein, and to grant it a new trial of this cause, and the Court having heard said motion, together with the argument of counsel thereon for the respective parties, and being fully advised in the premises, is of the opinion that said motion should be in all things overruled. It is therefore ordered that the said motion be, and the same hereby is denied and in all things overruled.

To which action of the Court in overruling said motion the defendant, Texas & Pacific Railway Company, then and there in open Court excepted.

It is further ordered that the writ of error bond in this cause be and the same is hereby fixed at the sum of \$25,000.00 dollars.

Entered July 8, 1913, Vol. F., page 495.

Endorsed: No. 182 Law.

Clara Hill vs. Texas & Pacific Ry. Co. et al.

Order Overruling Motion for New Trial and Fixing Writ of Error Bond Sum of \$25,000.00.

Filed and Recorded on this 8th day July, 1913.  
D. H. Hart, Clerk. By A. I. Campbell, Deputy.

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## ASSIGNMENTS OF ERROR.

### BILL OF EXCEPTION NO. 1.

In the United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

No. 182.—*Law.*

I. & G. N. Railway Co. and Texas & Pacific Ry. Co.

Be it remembered on the trial hereof the defendants presented their several pleas in writing, and on file herein, to the jurisdiction of the Court, to all of which pleadings reference is made as a part hereof, likewise as though written herein fully at length, and to all other pleadings on file as a part of the record hereof.

When and thereupon the Court overruled said pleas to the jurisdiction of said Court, to which action and ruling of the Court, noted in the judgment of the Court, to which reference is made, was then and there in open Court in all things excepted to by both defendants, to the end that said rights should be preserved and said rulings of the Court reviewed, which is here accordingly done and signed nunc pro tunc as of May the 16th, 1913.

The above Bill No. 1 is signed with the following qualification and explanation:

The suit in this cause was filed jointly against the International & Great Northern Railway Company and the Texas & Pacific Railway Company in the District Court of Frio County, Texas; the International & Great Northern Railway Company joined the Texas & Pacific Railway Company in an application to remove the cause from said State Court to this Court; the record in said cause was filed in this Court for the December term, 1912; at said term of this Court both defendants made a general appearance without reservation and pleaded to the merits of the cause. The plaintiff made a motion to remand the cause to the State Court. In reply to the motion to remand, which was heard at the December term of this Court, defendants filed a written statement to the effect that this Court had sole jurisdiction to try the case. After the motion to remand to the State

Court was overruled at the December term, defendants made an application in writing for a continuance upon the ground that certain witnesses were necessary for a proper defense on the merits of the case. This motion was granted, and the cause continued to the May term, 1913. When the cause was again called for trial at the May term, 1913, defendants for the first time offered the pleas in abatement mentioned in the bill and the pleas were overruled. A reference to the pleas will show that the defendant, Texas & Pacific Railway Company, only insisted upon its plea in abatement in event the plea in abatement offered by the International & Great Northern Railway Company, was granted.

Signed this 13th day of October, 1913.

T. S. MAXEY,  
Judge.

Endorsed: No 182 Law.

Clara Hill vs. Texas & Pacific Ry Co. et al.

Bill of Exception No. 1.

Filed October 14, 1913. D. H. Hart, Clerk

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### BILL OF EXCEPTION NO. 2.

Austin, Texas, June 22nd, 1913.

Honorable T. D. Cobbs,  
Attorney-at-Law,  
San Antonio, Texas.

Dear Sir:

Returning herewith your Bill of Exceptions covering the examination of the jurors, Vance and Lentz, I beg to advise that the examination contained in said bill is all that I have on the subject. I was not re-

quested to report any of said examination previous to that contained in said bill. Mr. Lewis, as I remember, was not present and Mr. Carter examined the jurors and he will bear me out in that matter.

Trusting this explanation is satisfactory,

Yours very respectfully,

C. E. PINCKNEY,  
Official Stenographer

In the United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs

No. 182.—*Law*

I. & G. N. Railway Co. and Texas & Pacific Ry. Co.

Bill of exceptions taken in connection with the examination of the jurors:

BE IT REMEMBERED, that on the trial of the above styled and numbered cause, and during the selection and qualification of the jury, J. G. Lentz and J. M. Vance, jurors, were called and questioned, and after being questioned, stated as follows:

#### EXAMINATION OF J. M. VANCE.

JUDGE COBBS: Mr. Vance, you were raised here, were you?

A. Yes, sir.

Q. You are a large property holder here, are you not?

A. Yes sir.

Q. You were speaking about having prejudice—will you explain what you mean by that?

A. Well, I have against these fake damage suits in the Court.



THE COURT: What is that?

JUDGE COBBS: He says he has against these fake damage suits in the Court.

THE COURT: Well, of course, every man has that, Mr. Vance; that is something any man would be prejudiced against. You don't mean to say if the case was a bona fide case?

A. No, sir, that is what I told Mr. Carter.

JUDGE COBBS: Would you be absolutely fair and be governed by the testimony and charge of the Court?

A. Yes, sir.

Q. And when you said you had prejudice you meant you had prejudice against these fake damage suits?

A. Yes, sir.

Q. You mean in this case you would be entirely influenced by, and nothing but the testimony and charge of the Court?

A. Yes, sir.

Q. Be perfectly fair and honest about it?

A. Yes, sir.

Q. It wouldn't take any more testimony in this case than in any other case; you said you would be governed wholly and entirely by the evidence and the charge of the Court?

A. Yes, sir.

Q. It wouldn't take any more testimony in this case—you have no prejudice against suits against railroads unless it is a fake suit?

A. Yes, sir.

Q. Well, any man would have a prejudice of that kind. You don't seem to have prejudice.

CROSS-EXAMINATION.

MR. CARTER: It is not my purpose to embarrass you, Mr. Vance, but from the predisposition you have you wouldn't be an ideal juror for the plaintiff. You think that it would probably take more evidence in a suit of this kind than in any other suit?

A. Well, I have a prejudice against faked-up suits.

Q. But you understand your mind is a very delicately constructed machine, and it is more than apt to lapse and fail on account of a great number of fake suits; and when you went into the jury box you would be inclined to watch carefully to see if this was not a fake suit; and might it not take more evidence in that case than it would in some others? Didn't you state that?

A. Well, it might.

MR. CARTER: Now that is the same question, your Honor, Mr. Vance is a most admirable man—

THE COURT: I will excuse Mr. Vance; you may except to it.

JUDGE COBBS: Note our exception to the Court's ruling.

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EXAMINATION OF J. G. LENTZ.

MR. CARTER: Mr. Lentz, you live here in San Antonio?

A. Yes, sir.

Q. A tailor?

A. Yes, sir.

Q. Have you any prejudice against personal injury suits?

A. I am in Mr. Vance's position ; that is about my view.

Q. In other words you would testify just about what Mr. Vance testified was his position ?

A. Yes, sir.

THE COURT: I will excuse him.

### CROSS-EXAMINATION.

JUDGE COBBS: I would like to ask him some questions. Mr. Lentz, how long have you lived here ?

A. About 18 years.

Q. You are a property holder here, doing business in San Antonio ?

A. Yes, sir.

Q. I want you to state to me just exactly your attitude with reference to the question Mr. Carter asked you, and with reference to what Mr. Vance stated ?

A. Well, I merely feel I have a little prejudice against suits for damages. Of course, I feel I could render a verdict according to the evidence in any damage suit ; but I think I am prejudiced.

Q. What do you mean by prejudice, Mr. Lentz ?

A. Well, just as the word implies ; I have prejudice.

Q. Well, can't you explain that, amplify it ?

A. Well, I always feel that there are so many fake damage suits—

Q. Then you feel that your prejudice is against fake damage suits ?

A. Entirely.

Q. And if the evidence shows this is a bona fide case, then you would be governed by the testimony and the charge of the Court ?

A. Yes, sir.

Q. Would you go into the jury box with a feeling that you couldn't do justice to both parties?

A. No, I don't think I would.

Q. You think you could go into the jury box and return a fair and impartial verdict?

A. Yes, sir.

Q. Mr. Lentz, you might have a prejudice against murderers generally?

A. Yes, sir.

Q. But you could go into the jury box and try him fairly?

A. That is my position.

Q. You could do that if he was charged with larceny?

A. Yes, sir.

Q. Yet as between the man and the State you could do justice?

A. Yes, sir.

Q. Why couldn't you do the same thing in damage suits?

A. I believe I could.

Q. Then you mean that although you have prejudice against fake suits you would not have prejudice against a fair suit?

A. No, sir.

THE COURT: Well, I think you are all right.

#### RE-DIRECT EXAMINATION.

MR. CARTER: Now you state, in limine, you felt just like Mr. Vance did, and he stated he had a prejudice against this class of litigation. Is that your position?

A. Yes, sir.

Q. And when he went into the jury box he would take that prejudice with him?

A. Yes, sir.

Q. Before he heard any testimony at all. Is that your position?

A. I don't think I would go into the jury box and take the prejudice.

Q. Well, what would you do with that prejudice when you had it?

A. Well, I don't know.

Q. Well, now, if you will be just candid and honest—the way to do, Mr. Lentz, is to come right out and tell His Honor. You have this prejudice, you admit?

A. Yes, sir, I have myself felt a little that way.

Q. And you would take it into the jury box?

A. I presume I would.

Q. Then when you went into the jury box you would be inclined to watch carefully—very closely, to see whether this was a fake suit?

A. Yes, sir.

Q. Now, then you think that being in that attitude, it would take more evidence in a case like that, than it would in another case where you would not have those predispositions—that attitude?

A. Well, I can't say whether I would or not; I couldn't say.

MR. CARTER: Well, now he ought not to be accepted if he don't know. There are plenty of jurors here that have qualified.

#### RE-CROSS-EXAMINATION.

JUDGE COBBS: Mr. Lentz, he asked you about this class of cases—you think he is referring to a class of damage cases that may not be as good as this suit?

A. Oh, no, I realize—

Q. You see he puts that question to you to emphasize a particular class. Now then you regard it as your duty to scrutinize every case to see whether it is a fair case?

A. Yes, sir.

Q. You don't scrutinize every case—that is what we want—you wouldn't have any prejudice in doing that?

A. No, sir.

Q. You would simply use your scrutiny to see whether it is a bona fide case?

A. Yes, sir.

Q. And then render a fair verdict, according to the law and the evidence?

A. Yes, sir; but when I say I am prejudiced against damage suits, I mean generally.

#### RE-DIRECT EXAMINATION.

MR. CARTER: But you don't admit you wouldn't carry your antagonism into the jury box with you?

A. Yes, sir.

Q. And your scrutiny would be in cases of this kind, it would be closer than in the average case?

A. Well, it would be close in any case.

Q. Well, you stated awhile ago you didn't know whether it would require more evidence or not?

A. No, I don't know.

MR. CARTER: Well, if he don't know whether it would require more evidence or not—

THE COURT: This is a case where the plaintiff claims to have been injured as a passenger in a head-on collision. Have you any prejudice one way or the other?

A. I don't know; I haven't considered the matter sufficiently to answer.

THE COURT: Well, you will be excused.

JUDGE COBBS: Well, note of exceptions.

That after having so stated and testified, the Court, over the objection of the defendant, did then and there, in open Court, direct said jurors to stand aside, holding that they were disqualified to sit in said cause as jurors, to which ruling and action of the Court the defendant then and there in open Court excepted, because said jurors were competent jurors and had not disqualified themselves to sit in said cause as jurors; and the defendant here now tenders his said bill of exceptions to the Court, as embracing its objection, and asks that the same be approved and made a part of the record herein, which is accordingly done.

This bill No. 2 is approved with the qualification that the stenographer certifies that he did not take down all of the testimony of the Jurors Vance and Lentz, and in addition to the testimony shown by this bill, both of said jurors gave evidence tending to show that they had some prejudice against personal injury litigation, and that this prejudice would go with them into the jury box, and would require evidence to remove it, and that their verdict might be affected by such feeling.

Signed and approved with this qualification on the 13th day of October, 1913.

T. S. MAXEY,  
Judge.

Both parties agree that this qualification should be attached to Bill No. 2.

H. C. CARTER,  
T. D. COBB.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and Texas & Pacific Railway Co.

Bill of Exception No. 2 as to Qualification of Jurors.

Filed October 14, 1913. D. H. Hart, Clerk.

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BILL OF EXCEPTION NO. 3.

In the United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs

No. 182.—*Law*

I. & G. N. Railway Co. and Texas & Pacific Ry. Co.

BE IT REMEMBERED, that, on the trial of the above stated cause, the plaintiff on cross-examination, asked the witness Dr. Dale, witness for defendant, the following questions, and he answered as follows:

MR. CARTER: Do you remember after you made the examination you put your arm around this little girl and told her she was as cold as a snake?

A. No; I don't remember such expression.

Q. You won't say you didn't do it?

A. I might say I didn't do it.

Q. Well, what did you do that for?

A. I don't think I did so.

Q. Don't you think it was very natural for her to want to leave your hospital?

A. Well, the nurses were there, and they can testify if anything was wrong. I never examine a patient unless the nurse is present.



Q. Did you put your arm around her in the presence of the nurses?

A. If I did, I intended to quiet her.

JUDGE COBBS: Anything of that sort occur?

DR. DALE: No, sir; I make it a rule never to examine patients except in the presence of the nurses. In fact bring them to my office for that purpose and prepare them for that purpose.

Q. You are a family man?

A. Yes, sir, an elder in the Presbyterian Church and 32nd degree Mason.

JUDGE COBBS: That will do, Doctor.

MR. CARTER: That will do.

THE WITNESS: There may be some of my people here, or you can telegraph to Arkadelphia or Texarkana, or anybody.

JUDGE COBBS: We want to ask, in view of the suggestions being made here against Dr. Dale, that this case be postponed until we can secure the depositions of witnesses from Texarkana to establish his standing and character—

THE COURT: What do you say, Mr. Carter?

MR. CARTER: No evidence of that kind would be admissible if it was here.

JUDGE COBBS: We ask then to prepare an application setting up the facts so that we can have an opportunity to have witnesses here to show the character of the man; to show that he is a man that wouldn't be guilty of anything of that sort—

THE COURT: I can't postpone the case any further.

JUDGE COBB: You will give us time to prepare that motion?

THE COURT: You may just consider it in.

MR. CARTER: Yes, sir, consider it in.

That thereafter the said motion was in all things prepared and presented to the Court. The said motion is in words and effect as follows, to-wit:

Clara Hill

vs.

No. C. L. 182.

Texas & Pacific Ry. Co., et al.

In the United States District Court for the Western  
District of Texas, at San Antonio.

Now comes the defendant, the Texas & Pacific Railway Co., and pleading surprise moves the Court to continue this cause for the term, or to postpone same to a later date in this term, for the following reasons, to-wit:

That heretofore, to-wit: on the 13th day of May, 1913, this cause was peremptorily called for trial and thereupon both plaintiff and defendants announced ready and the jury was selected and the trial begun. That the first witness placed upon the stand was the plaintiff, Miss Clara Hill, herself. That she was kept upon the stand on direct examination until the noon hour of Tuesday, May the 13th; that after noon she was replaced upon the stand as a witness for herself and continued to testify on direct examination for some time, when cross-examination of said witness was begun and continued for a long period. That then a redirect examination was made which lasted for a considerable length of time. That, though plaintiff was on the stand in her own behalf and examined both direct and re-direct by her attorney for a long period of time, none of the matters hereinafter referred to were brought out by her testimony.

This defendant would further show to the Court that it is the undisputed evidence in this case that the plaintiff, Clara Hill, was, on or about the —

day of January, 1912, taken by her attending physician to a sanitarium in Texarkana, Arkansas, which said sanitarium was and is operated by Dr. — Dale. That she remained there for a period of — days; that while there she complained of no symptoms that even remotely indicated that she was suffering from the troubles for which she was subsequently operated. That Dr. Dale kept her under proper care and treatment and close inspection, and made thorough examinations and found no trouble to exist which might be remotely considered as of sufficient gravity to require an operation such as the undisputed testimony shows was made a few months thereafter. That the said Miss Clara Hill was discharged from said hospital in a very much improved condition; that she was able to walk about the hospital building and the lawn adjacent thereto; that she gained in weight and that the prognosis was favorable. That all of this evidence was given by Dr. Dale, whose patient the plaintiff was. That by reason of these facts and of the said plaintiff having been a patient in the sanitarium of Dr. Dale, and having been treated for the period of time she was treated by him, makes the testimony of the said Dr. Dale exceedingly important to the rights of this defendant; and makes it important that said evidence should be given a fair chance to be corroborated if attacked in any way, and especially if attacked in a manner and at a time that makes such attack particularly damaging to this defendant.

This defendant would further show to the Court, and as the reasons for which a postponement of this case should be had, that on the 15th day of May, 1913, and after this defendant had announced that it rested its case, the plaintiff again went upon the stand in her own behalf, and in answer to questions propound-

ed to her by her attorney, stated to, and in the presence of, the Court and the jury, that while she was a patient in Dr. Dale's sanitarium in Texarkana, that he, the said Dr. Dale, called her into his private office and without her consent, and to her great surprise, took advantage of her and took her in his arms and embraced her. That she was very much alarmed at this action and cried and wept bitterly. That upon the said plaintiff leaving the stand, this defendant caused the said Dr. Dale to again go upon the stand for the purpose of making a statement. That the said Dr. Dale declared that the statements made by the plaintiff were wholly false and untrue, and further stated that he felt that his reputation was at stake and desired to be as emphatic as possible.

This defendant further says to the Court that the undisputed testimony shows that shortly after the return of the plaintiff herein, from the sanitarium of Dr. Dale at Texarkana, that its claim agent, Mr. W. L. Chew, went to the town of Queen City at the instance and upon the written request of this plaintiff, and at various times thereafter visited the plaintiff at her request, in an effort to settle and adjust this case, and that the said plaintiff did not at any time intimate to this defendant's said claim agent that Dr. Dale had been guilty of any improper conduct toward her. That if any such alleged fact had been even remotely intimated to this defendant's said agent, that same would have been promptly and thoroughly investigated, but coming as it now does at the "eleventh hour," renders it impossible for this defendant to make such investigation and to prepare to properly meet the evidence given by the said plaintiff the last time she was upon the stand, and makes it impossible for this defendant to proceed at this time to the closing of this case and properly present same to the jury,

and that if required to close that same will operate to the disadvantage of said defendant, and if said evidence by the plaintiff is permitted to stand without further investigation and contradiction, and permitted to go to the jury in its present condition, will inflame the minds of said jury and tend to cause, and this defendant believes will cause, the rendition of a grossly excessive verdict. That the undisputed testimony shows that the plaintiff remained in the hospital of Dr. Dale a week or ten days after this alleged misconduct and further shows that the plaintiff did not speak of said alleged misconduct to any one, and that she never referred to it or told any one of it, except her mother, until within the last few days when she advised her lawyers. That she did not even tell her mother when she came for plaintiff at Texarkana but only when it was suggested that she return to Texarkana and to the hospital.

That this defendant then and there, and before either side had closed, stated to the Court that the attack coming at the time it did, could not but have a tendency to inflame the minds of the jurors and cause the jury trying said cause, to probably render a verdict in such sum as that it would be excessive, and then and there requested the Court that this case be postponed a sufficient length of time to give this defendant an opportunity to bring witnesses from Texarkana, the home of the said Dr. Dale, that they might testify as to the character, standing and reputation of the said Dr. Dale, in his home and among his own people. That thereupon, defendant further requested time within which to reduce to writing its motion for a postponement of said cause, which said time was granted.

This defendant now says that to permit the testimony to stand as it is can serve only to inflame the

minds of the jurors trying this case, and will have a strong tendency to cause the jury to render an excessive verdict, and this defendant should be given an opportunity to prove to the jury the character and reputation of its said witness, Dr. Dale. And this defendant further says to this Court that it will proceed at once to produce such evidence and will have the witnesses before this Court as expeditiously as they may be brought under the facilities of rapid communication and transit that are available.

Premises considered, defendant prays this Honorable Court to postpone this cause and give this defendant such time as the Court may find is proper within which to make proof hereinabove referred to.

W. T. ARMISTEAD,

COBBS, ESKRIDGE & COBBS,

Attorneys for Texas & Pacific Ry. Co.

Which motion was filed on the 15th day of May, A. D., 1913, and called to the attention of the Court and was by the Court overruled, as shown by the order of the Court entered to that effect, showing that the defendant then and there excepted to the action of the Court in overruling the same. The copy of the order of the Court overruling the same, is as follows, to-wit:

“Clara Hill

vs.

No 182.—*Law.*

Texas & Pacific Railway Company et al.

May 15th, 1913.

“Now on this day came on to be heard before the Court, the motion of the defendant, the Texas & Pacific Railway Company, to continue this cause for the term or to postpone the same to a later date of the

present term for the reasons stated at length in said motion, and the same having been heard by the Court, and duly considered, it is the opinion of the Court that the said motion should be in all things overruled, and it is accordingly so ordered, to which ruling of the Court, the defendant, Texas & Pacific Railway Company, in open Court excepted.

“Vol. F., p. 478.”

That said cause was not postponed as requested, and the testimony on the point at issue was as follows:

And the plaintiff, Clara Hill, was permitted to testify as follows, without any postponement of the case as requested:

MR. CARTER: Did the Doctor (Dale) prove offensive to you in any way?

A. Yes, sir, in one respect.

Q. Tell the jury what happened?

A. Well, after the first examination he made of me, after I got able to walk out in hall, I was sitting out in the hall in the afternoon; and he asked me if I would come into his room, and I went in and he caught me in his arms and loved me just like I was a baby; but I was a lady, and in a few minutes a nurse came and he made the second examination, and he remarked, he said “you are as cold at a cat-fish,” and if I had ever given him any cause for it I don’t know what it was.

MR. CARTER: You may take the witness.

### CROSS-EXAMINATION.

JUDGE COBBS: Miss Hill, who was present you say?

A. I beg your pardon.

Q. Who was present in the room you say?

A. I was alone in the room with him.

Q. And he did what?

A. He embraced me in his arms and—

G. Go on.

A. And he made the remark, "You are cold as a catfish."

Q. That all?

A. That was all he said; and in a few minutes he called the head nurse and he made the second examination.

Q. Made the second examination?

A. He did.

Q. Who was the head nurse he called?

A. Miss Estes, I believe they call her.

Q. Was that the day he made this examination?

A. He made two examinations.

Q. What examination was it now you spoke of?

A. This was the last—just before the last examination, and he also made the remark—

Q. Did he call the nurse in when he made the last examination?

A. He did as well as I recollect.

Q. As well as you recollect?

A. Yes, sir.

Q. Well, who was the head nurse he called?

A. Miss Estes, I believed he called her.

Q. Who?

A. Miss Estes, was it not?

Q. Do you remember what day that was?

A. No, I do not know, but it was some time in January, along the last.

Q. Now, you say the nurse was Miss Tripper (?) or Childress?

A. Estes, was it not?

Q. Now this time—that was the examination he made of your person?



A. Yes, sir.

Q. And that is the time he examined you to see if there was anything the matter with your organs?

A. Well, he made an examination before that, but he didn't seem to be satisfied with it.

Q. Did he make two examinations of your organs?

A. Yes, sir.

Q. This was the last one he made?

A. Yes, sir.

Q. Now, I will ask you after he made that examination, you didn't run to your room and say—laughingly say, to your nurse, you knew you had nothing wrong with your uterus and ovaries?

A. I didn't make that statement.

Q. You didn't make that statement to the nurse?

A. No, sir, I went back to the room and cried bitterly, and the nurse came to my room and said, "Dear I wouldn't cry."

Q. And you deny that you went back and made that statement?

A. No, I didn't; I cried bitterly for a long time.

Q. And what nurse saw you?

A. Miss Nelson, I believe.

Thereafter Dr. Dale was recalled by the defendants, and testified as follows:

JUDGE COBBS: Doctor, you kept a record of this young lady from the time she went there, did you, or one was kept?

A. Yes, sir, it was kept by the nurse.

Q. Isn't that always done, Doctor?

A. Yes, sir.

Q. I will ask you, Doctor, if in your hospital practice, how many ladies have been put under your care and treatment?

A. This kind, possibly 800 or a 1,000 people.

Q. Well, how are you situated with reference to nurses?

A. Well, I have a good corp of nurses.

Q. Well, Doctor, I will ask you whether this young lady was constantly under surveillance of the nurses?

A. Yes, sir, except when she walked out around a few days.

Q. Well, was there nurses around there all the time?

A. Yes, sir.

Q. Well, you heard—are you—this is the record, I believe that was kept (indicating). Will you state who were the nurses there at that time?

A. Well, we have day and night nurses.

Q. Yes, sir.

A. These nurses were—the nurse who makes the sheet, they write down their names, it has to be with it.

Q. Doctor, are you a man of family?

A. Yes, sir.

Q. What size family?

A. Wife; two girls and two boys.

Q. Well, in reference to their traveling with you or otherwise, do you go by yourself or do you take them with you?

A. Well, I generally have my family with me—some member of the family.

Q. You heard this young lady's statements a moment ago?

A. Yes, sir.

Q. Do you want to make a statement about it?

A. I want to deny it in toto; it is absolutely false.

Q. Did anything of that kind happen?

A. No, sir. You take a nervous girl or unmarried woman, approaching an examination—they call it an ordeal—they get nervous over it, and I may have

said "Don't be excited, don't get nervous over it. But in making my rounds this nurse has to be with me and in my office.

Q. Well, Doctor, anything you do in that way would be for the purpose of quieting their nerves?

A. Of course, like I would a nervous child; and I have quit several examinations because the patient would get nervous and was upset, and just to quiet her I would say, "You are nervous and we will defer this, or put it off until some other day."

Q. Well, Doctor, I will ask you if you at any time ever had any improper motive towards this young lady?

A. None, whatever. She is a sick, nervous, hysterical girl; and this examination—I made a note of her staying a week there afterwards, or ten days. Absolutely, of course, I didn't. I would not be called upon to defend a reputation of that kind. She was a nervous sick woman, a girl, quite a child.

Q. And you did not—

A. Absolutely did not consider such a thing.

The defendants in open Court, prepared as stated its said motion to postpone or continue said cause as stated, in writing.

And thereafter and during the present term of this Court, the said defendant filed its motion for new trial and in support of the same introduced affidavits of the jury, to which reference is hereby made as a part hereof, likewise affidavits of the nurses from the hospital, and affidavits of witnesses to show the high character and standing of Dr. Dale, where he lives, all of which evidence the defendant desired a postponement to secure, to be offered on the trial, if the Court had postponed the case, which affidavits are attached to Bill of Exception No. 11 and made a part hereof.

Said defendants now present this, the Bill of Exceptions, to the action of the Court in not postponing or continuing said cause and giving defendants opportunity to meet said issue and contradict plaintiff, to all of which action and rulings of the Court the defendant then and there in open Court excepted, and now here presents this its Bill of Exceptions, which it prays the Court to now sign and approve, *nunc pro tunc*, as of the 16th day of May, A. D., 1913, which is accordingly done.

This bill No. 3 is signed with the qualification that the written motion copied in the bill was not read by the Court or to the Court, and was not presented to or read by counsel for plaintiff. When the Court ruled upon the motion to postpone, it was just after Dr. Dale had denied taking any improper liberties with the plaintiff. The Court was not called upon to rule upon the question of postponement after the plaintiff had testified in rebuttal. While it was agreed that the counsel for the defendant could put in writing the motion that was orally made, it was not contemplated that the written motion should be in any wise different from the oral motion which had been overruled. The Court does not concur in the conclusions or arguments which are made in the written motion, and the issue should be confined to the state of the case which existed at the time the ruling of the Court was actually invoked, and when the ruling was actually made. The only time any ruling of the Court was invoked or exception taken was just after Dr. Dale denied upon cross-examination that he had taken any improper liberties with the plaintiff, and no ruling of the Court was invoked after the plaintiff went upon the stand in rebuttal. There was no objection to any of the testimony upon the subject mentioned in this bill and no

motion to strike it out, and no definite period of postponement suggested. One witness, at least, Mr. Chew, gave testimony at the trial in regard to Dr. Dale's high character.

Signed with this qualification the 10th day of October, A. D., 1913.

T. S. MAXEY,  
Judge.

If our substitute for Bill No. 3 is not approved, this qualification should be added to Bill No. 3 presented by defendants.

H. C. CARTER.

Endorsed: No. 182 Law.

Clara Hill vs. Texas & Pacific Ry. Co. et al.

Bill of Exception No. 3.

Filed October 14, 1913. D. H. Hart, Clerk.

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The United States District Court, Western District  
of Texas, San Antonio Division.

I, C. E. Pinckney, hereby certify that I was the Official Court Stenographer in and for the above United States District Court when the case of Clara Hill vs. I. & G. N. Ry. Co. and the T. & P. Ry. Co. was tried in said Court at the May Term, A. D., 1913; and that the following three (3) pages contain a true and correct transcript of the special exceptions to the Court's Charge in said cause, as dictated to me in open Court, immediately after the Court had charged the jury and before the jury had retired to consider their verdict, and which were read to the Court at that time.

Witness my official signature this the 22nd day of May, A. D., 1913, at San Antonio, Texas.

C. E. PINCKNEY,  
Official Stenographer.

BILL OF EXCEPTIONS NO. 4.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

No. 182.—*Law.*

I. & G. N. Railway Co. and T. & P. Railway Co.

BE IT REMEMBERED, the following proceedings were had on the trial of this cause, to-wit:

The defendants except to the Court's General Charge as follows:

(1) Defendant excepts to that paragraph of the charge in which the Court charges the jury that "if they believe from the evidence that the plaintiff directly received any of the injuries alleged in her petition by reason of said collision, they are charged that their verdict must be for the plaintiff in such a sum as will fairly compensate her for any such injuries as were received, and as set forth and claimed by her in her petition;" because the only injuries claimed to have been received in said petition was that she received a severe shock and concussion and that by reason thereof her nervous system was severely shocked and injured and impaired; and there is no allegation of any specific injury done to her except those that would flow from the shocks and concussions, and the charge should have confined the jury's inquiry alone to such damages as would result only from a shock and concussion, and the amount

of recovery should have been confined to such injuries only; because it instructs the jury to find damages notwithstanding the fact that the railroad company might not be in any wise liable for the injuries not the direct and immediate result of the alleged shock and injuries which plaintiff alleges in her petition was the direct and proximate cause of the injuries; and it did not leave or explain to the jury that the present injury was caused from the operation or the operation itself was the direct and immediate result of said act, following in natural and unbroken sequence; and unless such was the case the railroad company would not be guilty of any negligence resulting from injuries that were not the proximate result of said alleged accident by defendant's train of cars, but was on account of her own carelessness and want of care in allowing an operation to take place, which operation was the proximate cause of her injuries.

(2) We further except to the charge of the Court which calls for damages for reasonable expenses which the plaintiff incurred for drugs, hospital services, medical and surgical treatment, because the Court presupposes in such charge that the operation and treatment was a necessary sequence to the injuries committed by the railroad; whereas, such injuries done to her by the operation might have been the proximate cause of such injuries.

(3) Defendant excepts to said charge because it further charges that, if the jury find that such injuries are permanent, and that they will diminish the plaintiff's capacity to labor and earn money in the future, that that element of damages should be considered—without explaining to them or allowing them to consider whether or not any such injuries caused by her operation or treatment were attribut-



able to the accident caused to her by the shock and collision.

(4) The Court erred in limiting his charge in that the plaintiff would not be responsible for the errors or mistakes of the surgeon who performed the operation provided she used ordinary care in the selection of a reasonably competent surgeon and did select a reasonably competent surgeon and submit her case to his judgment, because the test was not as to whether or not she had used proper care in having proper treatment or a proper surgeon to determine the necessity of an operation before she selected such a surgeon. And her right to recover is made to depend upon the question as to whether she selected a competent surgeon, although it may not have been necessary in the first instance to select one, and no burden is placed upon her to determine or use care in attempting to cure herself before resorting to the surgeon's knife.

(5) That the Court erred in submitting to the jury the question as to whether or not the plaintiff received hurts in said collision which lead to the injury and impairment of her ovaries without instructing the jury that such injuries could only result from causes alleged by plaintiff to come from a shock or concussion, and again has made her right to recover depend upon the selection of a person of ordinary care and prudence to perform the operation, whether it was required or not; and makes the case depend upon whether or not the surgeon who performed the operation was justified or not in performing same would entitle her to recover, notwithstanding some other course pursued by the surgeon might have saved the removal of her ovaries.

(6) The Court erred because in the Court's general charge he did not submit all the issues in said



cause and especially the defenses asserted and presented by defendant in their answer.

Be it remembered on the 16th day of May, 1913, in open Court, when and immediately after the Court had read its charge to the jury and before the jury had retired to consider of their verdict, the defendant, Texas & Pacific Railway Company, then and there in open Court excepted to said charge in *toto* and pointed out the foregoing objections and exceptions thereto, and now here in open Court tender the same as its Bill of Exception, which it prays to be now here signed, approved and made a part of the record hereof, and the same is now here accordingly done and signed *nunc pro tunc*, as of May 16th, 1913.

Dated this 13th day of October, 1913.

T. S. MAXEY,  
Judge.

Approved.

H. C. CARTER.  
T. D. COBBS,

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Company and  
T. & P. Railway Company.

Bill of Exceptions No. 4 to the Court's Charge.  
Filed October 14, 1913. D. H. Hart, Clerk.

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BILL OF EXCEPTION NO. 5.

The United States District Court, Western District  
of Texas, at San Antonio, Texas.

Clara Hill

vs.

No. 182.—Law.

I. & G. N. Railway Co. and Texas & Pacific Ry. Co.

BE IT REMEMBERED, that on the trial of the above stated cause, on the 16th day of May, 1913, before the jury retired to consider their verdict and after all the evidence in said cause had gone to the jury, all of which evidence is fully set out as a part hereof and annexed to this Bill of Exception, on Special Charge No. 1 requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired, as follows:

“You are instructed that under the evidence you will find a verdict for the defendant, because such injuries as plaintiff sues for could not be and were not the direct and proximate cause of the collision and shock, if any, to plaintiff.

W. T. ARMISTEAD,  
COBBS, ESKRIDGE & COBBS,  
Attorneys for Defendant.

Refused.

T. S. MAXEY,  
Judge.”

That the said motion for instructed charge, justified the request for the submission thereof and was asked upon the contention of defendant's that there was no evidence to support the judgment for the plaintiff and all the evidence introduced in the trial of said cause, is included and embraced in the following testimony, except such as may be embraced in other Bills of Exception, and all of said testimony is as follows, to-wit:

The United States District Court, Western District  
of Texas, San Antonio Division.

BE IT REMEMBERED, that on to-wit: the 13th day of May, A. D., 1913, Cause No. 182, Clara Hill vs. I. & G. N. Ry. Co. and the T. & P. Ry. Co., coming on for trial before Honorable T. S. Maxey, presiding Judge; and both sides appearing in person and by their respective counsel; and both sides in open Court announcing ready, and a jury having been examined, challenged, selected and sworn to try said cause, the following evidence was adduced:

PLAINTIFF'S EVIDENCE IN CHIEF.

DR. RALPH REDDITT,, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is Ralph Redditt; I live at Pearsall, Texas. My profession is that of a physician, and I have been a physician a little over thirty years. I am not engaged in my profession now, but have retired. I am acquainted with Miss Clara Hill, the plaintiff herein, having known her about 22 years. I have known her family about the same length of time. As far as I know, up to the time I retired from practice, I was family physician for the Hill family. I practiced in the Hill family and in that neighborhood. I never did any practice for Miss Clara Hill, the plaintiff; and she was never sick during the 20 years I practiced among the family that I know of. I never gave her any medicine nor prescribed for her. Her health was splendid up to the time I retired. Since the accident to her she appears

to be in very bad health and she does not resemble her former self; does not look like the same girl. I am a graduate of the University of Kentucky. I have lived in Pearsall 22 years. Prior to the accident the plaintiff was a stout, robust girl, capable of undergoing a great deal of hardship and doing a great deal of work. I have not examined plaintiff since the accident, but I have noticed her; and she seems lighter in weight and can scarcely get about, and has a pale, anemic look. I know Dr. Williamson. He has been practicing medicine in Pearsall about two years.

Whereupon it was agreed that the cross-examination of the witness Dr. Redditt should be deferred until after the examination of the plaintiff.

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### PLAINTIFF'S EVIDENCE IN CHIEF.

MISS CLARA HILL, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

My name is Clara Hill. I was born in Pearsall, Frio County, Texas, and have lived there all my life with the exception of two years during infancy, when I lived in Bastrop. I am unmarried. I was born on August 17th, 1888. On December 21st, 1911, I contemplated a trip to Atlanta, Texas. At the time I was working for a mercantile firm, the Melon Mercantile Company, at Melon, Texas. At that time I was getting \$30.00 per month; but in order to keep me they had promised me \$50.00 per month, from January 1st, 1912. I bought through transporta-

tion over the International & Great Northern Ry. Company from Pearsall, Texas, to Atlanta, Texas, making the purchase from the I. & G. N. Ry. Company's agent at Pearsall, and I traveled on that road from Pearsall to Longview and at Longview I got on the Texas & Pacific on the transportation I had purchased. Just before day-break, while we were on the Texas & Pacific Railroad, I awoke my sister who was with me, and told her we were nearly home and to get ready to get off; and I had prepared myself and she was getting ready when a collision occurred. My little nephew was also with us. We were riding in the chair car, and were going all the way through from Pearsall, and I had not changed cars after leaving Pearsall. When we arrived at a station called Kildare our train ran into an open switch and into another train. Both trains were passenger trains, and when they ran together there was a great shock to us all, and I was thrown out of my seat and was knocked unconscious. I was thrown forward and against the lower part of the seat. I fell forward on my side underneath the chair in the aisle; in the aisle and up against side of the seat. Several persons, probably three or four, fell on me. My sister was also thrown; and quite a number of people were thrown out of their seats. My sister helped me and I got back upon my seat. A man came through the train and told us to keep our seats, that nothing had happened; and he took hold of my sister's arm and told her to sit down that nothing had happened, and she replied that something had happened. In about an hour a trainman came through the car and asked us our names; and he looked at me and asked what was the matter with me and I replied that I was sick; and he said that I was scared; to which I replied

"probably I am," and he went on. I had only about fourteen miles further to go to get home; and in the meantime I begun to get stiff. My father met us at Atlanta and took me home and I went right to bed. I never felt any numbness until the next day and after the numbness left me the pain came on and I suffered for quite awhile before I was relieved. I felt sick at my stomach and could not retain food or water. The nausea first appeared when I got home but it was not as bad as the next day; but I had no appetite. I had a bruise on my back and one, two or three on my left side. There were two on my hips and legs. Immediately after the wreck I sat up in the seat in the car. At that time I felt nervous and weak. I had a kind of numb feeling and I did not realize at first that I was hurt. I thought, as the trainman did, that I was scared. When I arrived home I thought I would be all right in the morning; but when morning came I was a little worse. The symptoms of nausea began the morning after the collision; and I kept vomiting off and on from that time until I was taken to Texarkana on the 15th of January. I noticed that the mirror in the side of the car I was in at the time of the wreck was crushed as if some one had taken a hammer and crushed it. That was the mirror set in the wall of the car. About an hour or more after the wreck occurred my sister went out and looked at the wreck and came back and told me about it; and as I had never seen anything like it before, and as I thought the fresh air would help me, I went out and looked at the wreck. The engines had gone together and rebounded back and were standing apart. Both engines were demolished. I think we were at the place of the wreck for two hours or more before we were carried on. We were carried on in the same car we

had traveled in, but we had a new engine. Atlanta, Texas, was the place I had bought my ticket to. When we arrived at Atlanta my father met us there. When I arrived there I began to get stiff and numb, and I was taken to a restaurant and I remained there probably an hour before I was taken to Queen City. While at Atlanta they bathed my face and gave me some water. On account of the wreck I had no breakfast. The hack was brought to Atlanta and either my father or my sister helped me into it and I was carried home. I had to ride in the hack about two and a half or three miles from Atlanta to Queen City. When I arrived home I felt nauseated and numb. A nice dinner had been prepared for us, and I went to the table when I arrived home and looked at it; but it seemed like the sight of the table made me sick. Then a bed was prepared for me and I removed my clothes and retired. It was about one o'clock when I got to bed and I remained in bed all day. That was Friday I think. I had no doctor that day, but I sent for a doctor the next morning. Dr. Strong came to see me the next morning. He is in attendance on the trial of this case. When he came he prescribed for me. His medicine seemed to help me at the time. He left some little tablets for me to take; and about 6 o'clock that evening another tablet was sent me, and I had hardly swallowed it before this numbness left me and the pain came, and my mother thought that the medicine had brought the pain on; but I told her that I had hardly swallowed the medicine before the pain struck me. The pain drew my face and every part of my body seemed to draw. We called for Dr. Strong, but he was out in the country and we could not get him; and then we called for Dr. Roach of Queen City. He did all he could for me at the time. About 10 or 11 o'clock Dr. Roach



was called to see another patient. Dr. Strong had come in the meantime and I was made easy and went to sleep; and I think it was the next morning about 10 o'clock that another spell came on me; and I had still another spell at 2 o'clock that night. I suffered as I did at first, but not as much, and the doctor came and gave me more medicine and finally got me easy. I went to the sanitarium at Texarkana on the 15th of January. From the 22nd of December until the 15th of January I was not in bed all the time, but was up and down. When I first got up my mother placed pillows in a chair and I sat up that way, and I walked a little; and I think once Dr. Strong sent his buggy for me and I spent the day at his house. That was before I went to Texarkana. The nausea was more or less all the time. The doctor allowed me to eat soft foods, such as soup. I had no appetite to speak of. Dr. Strong finally told my father that he had done all he could for me, and he thought it best to take me to Texarkana. I was placed on a cot and several men came to the house and took the cot and carried me to the depot. The cot was placed in the baggage car and I was taken to Texarkana, 21 miles away. When I arrived at Texarkana I was taken in an ambulance to the sanitarium. Dr. Strong accompanied me from Queen City to the sanitarium in Texarkana. I think I was in the sanitarium 14 days. When I arrived at the sanitarium I was real sick, and nauseated and vomiting; but Dr. Dale's medicine helped me, and it was but a short while that I got so I could eat something; and at times I retained my food and at times I did not. After I had been in the sanitarium two weeks I became dissatisfied, as I was among strangers and had never been away from home before. I thought if I had to die I would rather be back home with



my people; but I was a whole lot better when I left the sanitarium, but had no more than arrived at home when I had another spell. It was about the first of February that I left the sanitarium. During February I was at my father's home. While there I was up and down. Dr. Strong treated me all the time. I started back to Pearsall on the 24th of March, I think. My father came as far as Atlanta with me, and I came from Atlanta to San Antonio on a sleeper by myself, and my people met me at San Antonio. I remained in San Antonio one night to rest, as I was tired and worn out from the trip. Mr. Eldridge and his wife took me from San Antonio to Pearsall. It was about March 26th or 27th that I finally arrived at Pearsall. When I arrived at Pearsall, Mr. J. A. Patterson met me at the depot with his automobile and took me home. When I arrived at home in Pearsall I lay down, as I felt tired and worn out. Up to the time Dr. Kingsley operated on me my health was poor. Before I came to San Antonio to be operated on and while I was in Pearsall, Dr. Williamson treated me. Dr. Williamson was in good health at that time, but he is a sick man now. The first time he made an examination of me Dr. Williamson remarked that there would have to be something done; and he asked me if I could come back the next morning. I went back the next morning, and he made a thorough examination and saw that an operation was necessary. He thought an operation was necessary. He said that I need not take his word for it but that he would bring me to San Antonio and I could go to any doctor in San Antonio I wished. I thought the matter over; and after that I got down again and was down quite awhile. I did not want to have an operation performed, because an operation was something that

frightened me. But I got down and it seemed as if I was down to stay. Dr. Williamson came to see me one morning and I told him that if nothing but an operation would help me that I was willing for it. He then said he would take me to San Antonio and see what the doctors there said. I was then brought to San Antonio and examined by Doctor Berrey, city physician, and Dr. Kingsley and also Dr. Stout, and they thought the operation was necessary. I then went back home again. The trip to San Antonio made me sick and I went to bed when I got back to Pearsall and was not out any more. I remained in bed seven days from the trip. Then I was brought back a second time and another examination was made of me. Dr. Kingsley and Dr. Williamson made the second examination. In reply to the charge made in defendant's answer that I am malingering, all I have to say is that from the time I was hurt I felt this awful pain in my hip and back, and it has gradually gotten worse. I am not putting on a thing; but have been just as simple and plain as I could be. I brought this suit about 8 months after the accident. That is what the record shows. My health before the accident was excellent. Before the accident I had no medical treatment to speak of. The only instance I recall was taking some tonic. It was in the summer time, I felt tired and fatigued and I took some Electric Bitters and it helped me. I did not take a great deal of patent medicines, as charged in defendant's answer. I took only two bottles of patent medicines that I can remember during my life time. I got the patent medicines I took in the drug store where I was working. The first medical treatment I had before the accident was for the measles. I had no doctor then, but was treated by my mother. Then I had whooping cough and my mother used a

simple home remedy for that and I had no doctor. A few years later I had the chicken-pox and I had no doctor for that. I got well of all of these diseases. When I was about 18 years of age a little black spider with a red spot on it bit me; and I went to Dr. Redditt and he told me to get a little salve and use it, but I took nothing internally. I went to him twice to look at that bite, and he said it was getting all right. Then just before I left Pearsall for Queen City I had a little boil on my leg, and I went to see Dr. Hope about it the evening before I left; and the next morning I worked in the store and prepared to work all afternoon. The next morning I called around and saw Dr. Hope about it and he said it was all right and gave me nothing for it. The boil was not lanced, but was broken when I was hurt in the wreck. It was bruised in the wreck. The instances I have related are the only occasions I received medical treatment that I can recall, before the accident. It is not true, as charged by defendants, that I was suffering with female troubles before the accident and was always a sickly girl. I did not have enough female troubles before the accident that I could tell anything about; and I needed no medical treatment nor anything; and as far as I knew I was perfectly sound. It was only after the accident that these troubles developed. If there was anything the matter with my back before the accident I never knew of it. I can feel that there is a curvature to my spine at the present time. I can discern that curvature myself. One of my hips is much higher than the other; and I cannot bear to stand any length of time or to walk, on account of the pain. It is my left hip that pains me and its condition is visible by looking at it when the clothing is removed. The condition of the left hip was all right before the accident

and I never suffered with it. My back was also all right before the accident. At the time of the accident I felt that something was wrong with my back and hip; but I thought I would overcome it and that it would pass away; but instead it seems to me to get weaker all the time.

### CROSS-EXAMINATION.

I was working for the Melon Mercantile Company just prior to leaving for Queen City. I was working at a country store out a piece from Pearsall. I do not know whether or not it was a corporation. I begun work there on the 5th of July, 1909, and worked nearly two years. I begun out there to work in 1909. My duties were to work on the dry goods side of the store and to buy goods for the store; and when I was required, to work on the grocery side, which I did. The store in question was three miles from Pearsall to the southeast. I lived in the town of Pearsall, but I would go out to Melon Sunday afternoon and stay there until the following Saturday night. My father was out there part of the time. He lived in Pearsall and I lived with him. My father left Pearsall in May, I believe, and I was hurt in the following December. My father went from Pearsall to Waldron, Arkansas, and from there to Queen City, where he now lives. I was going to Queen City and not to Atlanta when I left Pearsall. Our tickets called for Atlanta as the train does not stop at Queen City. We went in a hack from Atlanta to Queen City. I think we were at the scene of the wreck probably two hours but I did not notice the time we left the wreck, though I would say it was about 9 o'clock. We then went on in the same car to Atlanta, which I believe is about 14 miles away. I got out at the

scene of the wreck and looked at the engines, and I saw they had collided on a switch. My sister and my nephew went with me. There was quite a crowd out there. I think the crowd got breakfast a mile or so before we reached the town of Kildare. I do not know whether they ate breakfast where the timber was or down beyond the hill. I was out of the car at Kildare just a little while, probably twenty or twenty-five minutes. I was not taken out of the car, but I walked. When I arrived at Atlanta I was not taken out of the car on a stretcher, but I was assisted by my sister. I went into the depot a while and rested and finally went over to a restaurant and remained there until the hack came for me. Nothing was done to me there. I had no engagement to meet my father there; but there was another train which left Atlanta shortly after we were to arrive and we intended to take that train to Queen City, as it stopped at the smaller places. My father intended to meet me in Queen City. He lived two blocks from Queen City. I do not know the name of the public road my father lived on at Queen City, but it was the road that ran parallel with the Texas & Pacific Railroad, and was the road running from Atlanta to Queen City. He lived on the west side of the road. The main street of the town runs east and west and my father lived right at the end of the street, about two blocks from the railroad track. We lived on the west side of the railroad track. I told the person who came through the car that I thought I was hurt, and he replied "You are scared," and I said, "Maybe I am." That was a tall slim man. He was not talkative to me. He was a railroad man, but he did not look like a conductor to me, as he was not dressed like one. He was alone. I was sitting in the seat next to the aisle, about midway of the car. I am not sure

on which side of the car I was sitting but I think it was on the west side or left-hand side going toward Texarkana, or Queen City where I was headed. My little nephew was on the seat with me and my sister was sitting on the opposite side of the aisle from me on the east side about the middle of the car. My sister was hurt some. I saw others who were hurt. There was an elderly lady that was hurt and was assisted back to a berth. She was a large woman. I do not know that she is well and doing well. She did not cry out "we are going to drown" that I know. I told the trainmen I thought I was hurt. I remember a man coming to me and asking my name and address and asking me if I was hurt, and I remember telling him I thought I was. I do not know how much glass was scattered about but I saw some in the windows. A mirror was crushed between the windows. I do not know how many windows were broken in the chair car as I did not count them. There was glass thrown around; but I do not know that everyone that was hurt was hurt with glass. None of the glass hit me in the face. I am sure of that. I did not know I had a little scar on my face. I did not receive a scar in the chair car. If any one said I had a piece of glass in my face it must be a mistake. My little nephew got a little piece of glass in his face, but I did not. He was sitting on the seat beside me at the time. It must have been an hour or more after the wreck before I got out and looked at the engines. I went forward to get out of the coach and I think I got out on the west side. I did not count the coaches up to the engine, but there were several. I do not know that there were seven cars and a tender before I got to the engine. It was something like four or five hundred feet, I guess. I think the car I was in was the rear car next to the sleeper. I do not know



how many sleepers were behind the car I was in. The accident was on the morning of December 22nd. I did not wait until the 24th to get a doctor; but I got to Queen City on the 22nd and I had a doctor the following morning. I am sure of that. I know positively that I started on the 21st and arrived at Queen City on the 22nd and did not have a doctor the first day because I did not want one, as I thought I was going to get all right; but the next morning I was no better and a doctor was called. The doctor came about 9 o'clock on the morning of the 23rd. I did not send for him about 11 or 12 o'clock of the 24th and he came in the afternoon; but I sent for him on the 23rd, as I recollect, and he was not in. It is true I had a doctor on the 24th. I think I counted up eight visits that the doctor made after that. He was not called each time; but he took an interest in me and came without being called. The first time he came without being called was about four o'clock in the afternoon. On the 23rd he came in the morning. I do not remember whether I had vomited up to that time; but I had been sick at my stomach. I told him about the scar on my limb and he treated it. I do not know whether Dr. Strong said anything about the bruises on me or not. I do not know whether he saw them or not; but he prescribed for the boil on my leg. I had had the boil on my leg just a few days before I started from Pearsall. I did not speak to Dr. Williamson about the boil before I left Pearsall, as he was not there; but I did speak to Dr. Hope about it. Dr. Hope has since moved from Pearsall and I do not know where he is now. Dr. Redditt was our family physician for a while and then Dr. Magnus was. They never practiced for me in my life, either before or since the accident. I think I weighed either 108 or 109 at the time I was hurt. I do not know how

much I weighed when I left the sanitarium at Texarkana, but I think it was eighty odd. I had lost several pounds during that time. I had been home several days when I was weighed. I think I weighed nearly 90 pounds when I was weighed at Queen City, after returning from Texarkana. I had lost about 18 pounds. I did not weigh just before I started back to Pearsall; but I think I had picked up a little, but I do not know how much. I do not know whether I had gotten back to my normal weight of 108. I had not gained considerably, but I had gained some. I was not improved so much when I came home from Texarkana, because I had a hard spell when I arrived at Queen City. I got in about 9 o'clock and that afternoon at 4 o'clock this spell came on me. It was a weak nervous spell, and I had no control of my nerves whatever. I do not know what was given me for those spells. I had no such spells before I was hurt. I had never had any before the 22nd of December, although if I became frightened I would feel weak. I had never had before the accident the same thing I had after the accident. I had the last spell yesterday; and I have been awful weak today, but am able to be around. I came to an Antonio on last Saturday. I had no spell Saturday, but I felt weak. I did not run back to the Gunter Hotel Saturday. I was not with my sister and a young gentleman Saturday and came out of the Gunter Hotel and left them and went back. My sister and I were alone until Sunday afternoon, at which time my sister and my brother-in-law came. I think counsel has my sister and myself mixed. My sister went back to the hotel and got a letter and I remained at a restaurant. I know what counsel has reference to. A great many people take my sister to be me and me to be her; and it was my sister that counsel saw go



back to the hotel. I believe Dr. Strong began treating me on December 23rd and he treated me up to the time I went to Texarkana, on the 15th of January. I remained in the sanitarium about 14 days, which would be to the 29th of January. I improved some while I was there; but I did not come home practically a well lady. I came home feeling a whole lot better. I did not have the skin broken on me, except the little boil, in the wreck. The boil had not already broken before the wreck. Dr. Dale treated me while I was in the sanitarium at Texarkana. We arrived at Texarkana on train No. 6, which gets there about two o'clock, and Dr. Strong left that night on the night train. I had not written to the railroad company for damages before I went to Texarkana. I think my sister wrote to them telling them I was hurt before I went to Texarkana. I do not know Mrs. Davis that got several thousand dollars for damages at Pearsall. When counsel speaks of my writing or telegraphing the company that they ought to pay me a large amount he has reference to what I told Mr. Chew. He came to see me just before I was taken to Texarkana and wanted to make settlement with me, and I told him that if I was not hurt I did not deserve anything, but that if I was hurt I did deserve something. I did not say in that conversation that Mrs. Davis had received a large amount and that I was entitled to a large amount; but later on I filed suit and I told him about that incident. I told him that I thought I was injured for life. I thought over the matter of a law suit myself; but I did not consider it in the car at the time of the accident. I did not talk the matter of a damage suit over there in the chair car. I did not hear the passengers going around and saying "here's so many dollars, and here's so many dollars," indicating where glass hit

them in the hands and faces. I did not hear anything like that, and it was several months after before I thought anything about the matter of a damage suit. I went to Texarkana for treatment only one time. Since that time I have not seen Dr. Dale except one time last January when I saw him on the streets in San Antonio. Dr. Williamson treated me after I got back to Pearsall. He gave me some medicine, but I do not know what it was. It did not taste good. When I went back to Pearsall I was living five or six blocks from the depot. I walked from the train to an automobile and went from the depot home in an automobile. Mr. Magus Smith did not meet me there and help me up on the steps. I think I am better now than when I came from Queen City to Pearsall; and I think the operation has helped me. I think I was operated on about 9 o'clock Monday morning, June 17th, which was five days less than six months after the accident. I came to San Antonio once and went back to Pearsall; but did not do as well as I thought I would, so I came back for a second examination, and remained and was operated on. The first time I came to San Antonio Mr. McKinley, my brother-in-law, and his wife my sister, came with me. They live at Melon, Texas. Dr. Berrey, Dr. Kingsley and Dr. Williamson examined me on that occasion. Dr. Williamson did not come with me to San Antonio exactly; but I came in on the early train and he came on the 2 o'clock train. He did not tell me to come to San Antonio and be treated for a dislocated hip, and he said nothing about a dislocated hip. He did say he knew something was wrong with my hip and back. He did not say it was a dislocated hip, but he said it was knocked up, and that was the only examination he made. I was told that Dr. Berrey was the city physician. I do not know his ini-

tials. He is a large, heavy-set man, nearly as large as Judge Cobbs. The doctors examined me about 5 o'clock. It was some time in May, but I cannot say the exact date. It was about a month before I was operated on. I do not remember whether or not they gave me any medicine to take home with me. I do not think that the doctors gave me anything, as Dr. Williamson was treating me, but they let him continue his treatment. They approved of all he had done. The doctors examined me just as Dr. Williamson had done, but they made a more thorough examination and told me that the hip was knocked up. In about a month I came back and was operated on. At the time of the operation Drs. Kingsley, Williamson, Taylor and Kemp saw me. I do not know exactly how long I was under the knife; but I was taken out about 9 o'clock in the morning and it was about the middle of the evening before I began to notice things. I think the doctors used ether as an anesthetic. I was put under the influence of the anesthetic in the morning and my sister came in on the train about 1:15 p. m. and I recognized her when she came in. I think in one way I am better now than I was before the operation; but as I stated, my back and hip seem to get worse instead of better. Dr. Williamson examined me thoroughly before the operation. I did not know that a majority of ladies have curvature of the spine; and if they do I certainly feel sorry for them. There is a difference in my spine now and before the accident. Dr. Williamson and Dr. Kingsley and that crowd examined me for curvature of the spine. I would be willing to submit to an examination now for curvature of the spine, including the X-Ray and all; but I would want my doctors to be present. Anyone who can see can discern that my back was careened and curved. The

way in which I showed to the jury that my hip was not natural was the only way in which I could show them. As counsel stands his hip does not look natural, but he is not standing with his feet straight as I stood. I stood with my feet straight so that no one would think I was trying to make one side larger than the other. When I was on the train at the time of the accident I wore a big black hat with a willow plume on it. I also wore a linen coat suit, of a tan or linen color. At the time I took the patent medicine I have testified about I was living at Pear-sall and working at Melon from Monday morning until Saturday afternoon. I have indicated the size of the bottle containing the medicine, which was Elec-tric Bitters. It was summer time and I was working and felt tired and I thought the medicine would make me feel better, so I took it. That was in the summer before the accident. It is not true that I was very much run down when I took the medicine, but I was nervous. I was not very much nervous that I could tell. I had not been ill before I went up to Queen City to see my parents. I had only had the little boil that I have described, and I had been working in a big dry goods and grocery store. Before that I had not been sick. I had had the boil only a few days before the accident, and I went to see Dr. Hope about it, but he said it was all right and did not treat me for it. He examined the boil and I went on. I called for Dr. Strong when I was at Queen City. He was not my father's family physician, as my father had not had a doctor since he arrived there. Dr. Strong treated me for this specific or local trouble. He knew the place was bruised and he treated it locally. I have indicated the place where the boil was located. If it had been bruised Dr. Strong could have seen it, and he knew it was bruised. Dr. Strong treated me for

that. When I went to Texarkana to Dr. Dale's sanitarium the boil was well. That boil was the first one I had had in my life. It came a few days before I left Pearsall, and was bruised and was sore probably a week or more. I never made the statement that the presence of the boil made me nervous and bothered me a good deal, and I complained about it to Dr. Strong. The morning that Dr. Strong first came I felt weak and numb, and he examined the boil and gave me some medicine. I was not so nervous at that time, but after this numbness left me I was in a nervous rigor. By numbness I mean the numbness occurring at the time I was hurt. One place at which I was hurt was my back. My back was hurt by being thrown out in the aisle, just as counsel indicates. The aisle wasn't much wider than that (indicating) and I was rammed against the seat like that (indicating). I cannot say whether I was lying straight along the way the aisle ran. I struck the seat with the lower part of my back. The small of my back struck the chair. I am sure of that. I was thrown forward and I do not know how the small of my back could be struck by the chair, as I was knocked senseless, but I suppose it was something like the way I have indicated. I know that I was thrown to one side; and I am sure I was thrown forward into the aisle, and hit the chair with the small of my back. My hip must have been struck somewhere also, but I do not know exactly how. I cannot say that either my back or my hip struck the chair. I do not know exactly whether it was my left or my right hip which was injured at that time; but my left hip is injured now. Some one also fell on me. Besides the injuries I have already described there was a large bruise here (indicating) and one here and one on my leg way down (indicating), and a place on my back. The in-

juries I have named are the most important ones. There were some other bruises but they did not bother me. I did not notice my bruises particularly until after I was removed to Texarkana. When I did discover the bruises there were no other bruises except at the places I have indicated. I believe I stated this morning that I thought it was probably an hour after the collision before a man came around and asked me how I was hurt. At that time I had not been out and walked around. He asked me if I was hurt. Just one man asked me that, and I do not know whether he was a conductor or not. He was a tall slim man and I know he was a train man. I do not remember Mr. Johnston coming and talking to me. I do not remember Mr. Johnston coming to me and asking me if I had been hurt. The trainman or conductor asked me "Are you hurt," and I said "I am," and he said "You are scared." I knew I was hurt at the time. I told the train man I thought I was hurt, and he said "Oh no, you are frightened." At the time I felt numb and I thought I was hurt. I had no great pain at that time, but it was a kind of numb feeling. There had been no change in the way I felt from the time I felt up to the time I went out and walked around. I got out of the car and walked a few hundred yards, I guess. The train stood upon an elevation and I had to step way down to get off the car. The car was probably as high as the table indicated, but I did not get down alone. I got down, but not alone, as my sister was with me. My sister assisted me from the car to the ground. She did not pick me up and lift me down, but she assisted me just like Mr. Smith would catch hold of my arm and assist me down. I do not think I could have gotten down just as well without assistance. I got back up in the car the same way I got down. My sister did



not lift me back up in the car. The injured hip I have spoken about must have been injured when I was thrown down in the aisle. It is not true I never found that out until Dr. Williamson found it, but I complained of that side all the time and Dr. Strong fixed me up some linament for it. The letter handed me is dated May 9th and is directed to W. L. Chew, and is signed by myself and is in my handwriting. The next letter handed me is dated April 15th, 1912, and is directed to W. L. Chew and is signed by myself and was written by me. It is not a fact that I never said a single word to any human being about having my hip injured in any way until I went back to Pearsall and was told that by Dr. Williamson. I told Dr. Strong there was something the matter with my hip. I went to his office one afternoon and said "Dr. Strong, there is something the matter with my hip." I do not know that I told Dr. Dale about it, but he made a thorough examination and he treated me, and kept a chart of his examination and treatment. When I left Dr. Dale's hospital I was improved some. I did not discuss the question of a damage suit when I went back to Queen City from Texarkana, but it was several months after that that I discussed the matter at Queen City. I did not come direct to San Antonio from Texarkana, but I went to Queen City and remained there from the 30th of January until the 24th of March. I came from Atlanta to San Antonio alone. I think my train left Atlanta at 2 o'clock in the afternoon and I arrived in Antonio the following morning. I traveled all night in a sleeper. When I arrived in San Antonio I believe I went right on up to the hotel in a cab. My sister accompanied me from the depot. At that time my sister was working for the Melon Mercantile Company and lives at Pearsall. She came to San

Antonio to meet me. I stopped here in San Antonio and my brother-in-law Mr. McKinley, came up also and met me. I did not go anywhere while I was here, and I do not know what Mr. McKinley did while he was here. I do not remember whether anything was said about employing a lawyer at that time. I do not know whether Mr. McKinley went to consult a lawyer on my behalf at that time. It is true that I consulted a lawyer after I had tried for a long time to get the company to settle and I did not think they offered me what I deserved. I had been trying to get a settlement through Mr. Chew. I do not know who has told me that I had a magnificent law suit and to hold out for big damages. It is true I was told I was hurt. It is true that before I employed my lawyers I was told by a number of persons that I should bring a law suit as I had been injured in the wreck, but I used my own judgment about that. My people did not want me to bring a lawsuit, but they thought if I could get a compromise that would be best. If the matter had been left to me and I had been given what I deserved I would have settled. I told several people about my injuries and how I was hurt. I told my friends at Pearsall about how I was hurt, and I told them just what I have detailed here. When Dr. Willaimson examined me and suggested to me that I had a dislocated hip, he also told me that I was hurt internally and that all the medicines in the world would not help me, except temporarily. He told me that a surgical operation would be necessary; and I believed him, as he was a truthful doctor. He then made the remark that I need not take his word for it but that I might consult other doctors and prove that his diagnosis was correct, which I agreed to do, and came to San Antonio and had the operation. At the time of the accident I had the numbness I



have described and was sick at my stomach constantly and I had a headache. I could not say for sure whether or not I vomited right after the accident, but I did vomit the next day. I was so sick I didn't pay much attention to whether I vomited right after the accident; however, I was sick at my stomach. I did not eat any breakfast the day of the accident; nor did I eat any dinner or supper. The next morning I was brought some breakfast, and I told them I did not care for anything; but I took a bite or two although I did not really want it. I did not eat anything that day nor for several days. I did not tell Dr. Dale that I was hurt, as he knew I was. I told him I was hurt in the accident; but I did not tell him how I was hurt because I did not know. I complained to him of pain. The greatest pain I had while I was in his hospital was in my back, and I told him the location of the pains. I complained to him of my side and back. I could walk around after the accident. We live right at the head of the main street at Queen City, just a few hundred yards from Dr. Strong's office. I could not walk from our house to Dr. Strong's office for several weeks after the accident. The first time I went to Dr. Strong's office he sent a horse and buggy for me and I went in that way. For a few days I walked to Dr. Strong's office. I did not walk all over the town at Queen City. I went to a few places at Queen City but not very far. I went to one place and stayed all night. After I returned to Queen City from Dr. Dale's sanitarium I did not walk continually; nor did I walk wherever I wanted to go. I would walk as far as Mr. L——, a little piece the other side of the drug store. I could not say just how far it was; but it was a few hundred yards to the drug store and his house is a little distance the other side. After I returned to

Pearsall I walked around when I felt like it because the doctor told me it was the best thing for me. It is true that I got my sister to hold my position for me at Melon and that I expected to return to work there. I did not change that purpose, because I thought I was going to take my place and I came back with the intention of going to work. I did not change my purpose after I talked with Dr. Williamson. When I left Queen City I was not strong enough to do anything but I expected to be able to work later; and it was my purpose in coming back to take my place after I got able. I told my counsel awhile ago that I had never been sick to amount to anything before the accident. It is true that I went to school at San Marcos, Texas, but I did not quit school there on account of my health, but I quit on account of being homesick. That was in 1906. I was homesick at the time, but I did not have a doctor. I did not quit school on account of sickness. I was homesick, but I was not sick enough for a doctor. That was the first time I was away from home, and I do not know whether I am subject to sickness of that kind. I never had a fainting spell in a business school, as I never went to a business school in my life. It was my sister that had a fainting spell at school. She is my sister who is slightly older than myself. I never had a fainting spell in my life before I was hurt. I am better now than I was before the operation, and I think the operation has helped me. It is not true that when Mr. Chew was at Pearsall that I walked from my home to the depot, but I went in Dr. Williamson's buggy. It is true I walked up and down the streets in San Antonio at the last term of Court, but my folks were with me and assisted me. It is true that I walk better now than I did then when I am not nervous and weak. Today I am nervous and weak and can hardly

walk. I did walk around the desk in the courtroom without being assisted, but I came near falling and Mr. Smith assisted me. I have walked around over town at Pearsall, but I have fallen, too. I did not faint, but I just gave away in my back and my hip was not strong; I do not know how it was, but nevertheless I would fall. I fell that way before I was operated on. I would fall at home at Pearsall. I did not walk around without assistance before I was operated on. At home Mr. Chew has seen me walking about the house. I can get around any place I want to go if it is not too far. My little nephew was sitting next to the window on the same seat with myself at the time of the accident and I was next to the aisle.

#### RE-DIRECT EXAMINATION

Mr. Chew, the Claim Agent for the Texas & Pacific Railway Company called to see me while I was at Queen City, and he also called to see me while I was in Texarkana at the sanitarium. He has been to see me twice at Pearsall. Mr. Chew has been to see me only once in San Antonio, and that was the day we came up together. In other words he has been coming to see me occasionally ever since the accident. I have paid the People's Drug Store of Pearsall, \$175.00; the H. M. Mercer Drug Company, \$75.00, and I paid \$44.20 for nurse at Pearsall; I paid Dr. Williamson \$300.00 and paid Dr. Roach of Queen City \$3.25; and paid Dr. Strong \$86.00; paid Dr. Dale \$25.00; and the Sanitarium at Texarkana \$47.10; \$6.50 for drugs at Texarkana; and \$3.00 for ambulance; and \$259.15 to the Santa Rosa Hospital in San Antonio. Those bills have all been paid. I owe Dr. Cochran \$3.00; and I owe other bills I do not know

just what they amount to. All the charges are reasonable charges for such services. Dr. Stout made an examination of my blood.

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### PLAINTIFF'S EVIDENCE IN CHIEF.

DR. B. F. KINGSLEY, having been duly sworn, testified as follows:

#### DIRECT EXAMINATION.

My name is B. F. Kingsley. I am a physician and surgeon. I have been practicing my profession 39 years. I am a graduate of Detroit Medical College and the Long Island Medical Hospital. I remember performing an operation upon the plaintiff herein. It is not true, as charged by the Texas & Pacific Railway Company, that I was guilty of malpractice in performing that operation upon the plaintiff. I have been practicing medicine in San Antonio about 35 years. I have held the position of consulting surgeon for the Southern Pacific Railroad. I held that position a couple years several years ago. On the 27th day of May, 1912, I was in consultation with Dr. Williamson and Doctor Berry. I examined the plaintiff very carefully. We observed in the outstart of the examination that the facial expression of the plaintiff was that of severe pain. She had a pale enemic appearance and was very nervous and there was a general muscular tremor. Upon examining her further I found her pulse was 120 and her temperature was 102 and 102 2-10ths. Normal pulse is about 75, and normal temperature is 98 1-2. The pulse was quite irregular, showing an irritable condition of the

vessels and heart, though I saw no evidence of organic heart trouble. Examining her further I found a soreness, on pressure, over the lower portion of the spine and an inability to stand at that time, especially with her eyes closed. In fact her condition at that time was so critical that it was impossible to get her on her feet to make certain tests we desired to make. I also instituted a general examination and a digital rectal and vaginal examination, and found her ovaries enlarged and the womb displaced, and one of the ovaries displaced, and very great tenderness around the region of the womb—so much so that the slightest pressure would cause her to cry in pain. I also found a soreness over the abdominal region, especially over the sides and over the region of the ovaries. That was the general condition that I found her in at that time. There was some portions of the examination we could not make at that time, owing to the plaintiff's condition; and I had an engagement to meet Dr. Berry the next morning. So the next morning I had occasion to confirm the view I had made the day previous and I then advised an operation. I did not perform an operation at that time, but I advised it. The plaintiff came back on the 15th of the following month and was sent to the hospital on the 16th and was operated on on the 17th. I found a condition of general inflammation throughout the pelvic and lower abdominal tissues. The ovaries were enlarged and bound together by adhesive bands or adhesions as a result of the inflammatory condition. These adhesions were of comparatively recent origin as evidenced by the ease with which they were broken up and overcome. The ovaries were removed and it was necessary to remove the entire appendages, both ovaries and the tubes, on account of the condition they were in. It was

necessary to remove the appendix also, as it was involved in the inflammatory process and bound down by adhesive conditions, which are recognized by those of authority as necessitating operations of that kind always. The plaintiff went through the operation as well as the average patient does in that condition and did about as well after the operation as patients usually do. In fact, she left the hospital in a couple of weeks; and afterwards, I understand, had a collapse at home which, I understand, was the result of acute constipation or obstruction of the bowels or something of that kind. But as soon as that condition was overcome her condition was relieved and she has been doing fairly well ever since. She has her ups and downs, and attacks of nervousness and I have seen her quite a number of times since then and have never found her without some fever and more or less nervous and unable to sleep, with indigestion which is worse at times than it is at others. The removal of both of a woman's ovaries, as was done in plaintiff's case, unsexes a woman. I also removed plaintiff's appendix. What I did was absolutely necessary by reason of the conditions I found.

I make a specialty of such operations as was performed on the plaintiff. If the operation had not been performed as it was I think the plaintiff would have been dead by this time, and it was a question of saving her life. I do not think that the plaintiff, in her present condition, is fit for any mental or physical work. She had fever yesterday and has had fever within the last few days. I examined the plaintiff's back and found that the left hip is lifted probably three-quarters of an inch above the other; and a shortening of the right leg something like three-fourths of an inch. The lower dorsal vertebra is deflected to the right at least half or three-quarters of an inch,



and it is over that region she has complained of soreness all this time. Summing up plaintiff's entire case I do not see how it could be otherwise than permanent. She may be better perhaps than she is now; but I do not see how she could very well be in the best of health, and her outlook is that of an invalid as long as she lives. There is no question about her being unsexed; and I would regard those conditions as permanent. The conditions found in plaintiff could have been produced by an accident or trauma. From my examination, and assuming that the plaintiff was a healthy woman before she had the accident in question, I would attribute her present condition to the accident. My fee for the services which I performed in connection with the plaintiff were \$500.00, which is a reasonable charge in my opinion. That is what I have charged the plaintiff for my services.

#### CROSS-EXAMINATION.

The plaintiff was brought to me as the patient of Dr. Williamson of Pearsall. He did not tell me what treatment he had been giving her; nothing was said about the case when I first saw her. He did not bring the plaintiff to me with the request that I make an examination for a dislocated hip. It is not a fact that I made my examination and told Dr. Williamson that there was nothing the matter with the plaintiff's hip, but that there was some internal organ affected. I make a specialty of abdominal and female operations, and I make many of them. I do not know how many I make in a year but I make quite a good many. The patients pretty generally get well. I have had pretty good results; and they rarely die unless they neglect it too long. The general appearance of plaintiff when I saw her first was pale and anemic and

very nervous; indeed, unable to stand; with a facial expression of suffering a great deal of pain. The plaintiff impressed me as suffering from some trouble. Of course she was profoundly nervous. She was not necessarily of a nervous type, because originally she might not have been very nervous. I think that description answers the question as to "whether or not she impressed me as being a sturdy, healthy type of woman or a nervous or neurasthenic type. I found the plaintiff to be a nervous type. When I first saw the plaintiff I believe she was below normal weight, and I understood she was considerably below normal weight. The plaintiff did not complain to me of any of the following symptoms except as I brought them out by investigation viz: frequent headaches, mental depression, neuralgic pains in various parts of her body, hot flashes, insomnia, rapid heart action, tenderness along the spine, muscular weakness, a sensation of fatigue, cold hands, and feet, indigestion, constipation, pain and tenderness over her abdominal region and her pelvic organs. The plaintiff complained of soreness over the abdominal region, more or less headaches, backaches; vomiting at different times. Nothing was said about mental depression. She complained of neuralgic pains in various parts of the body. She did not complain of hot flashes. I do not know whether she complained of insomnia, but naturally that would arise as a result of her condition. She had a rapid heart action; and I have stated that it went to 120. The plaintiff complained of tenderness along the spine, muscular weakness, a sensation of fatigue, cold hands and feet, indigestion, constipation, pain and tenderness in her abdomen and pelvic organs. I could not say whether plaintiff suspected that her pelvic organs were diseased, but I presume she must have. The plaintiff



was brought to me to be examined; and I would say that I presume she did suspect that her pelvic organs were diseased. A part of plaintiff's complaint was nervous prostration or neurasthenia or nervous exhaustion, and she was suffering from those complaints. The question of neurasthenia was a secondary condition with me. The condition of her pelvic organs was more prominent in my mind than the question of neurasthenia, which was altogether the outgrowth of those conditions. However, I think the plaintiff was suffering from neurasthenia; and I think the accident the plaintiff sustained on December 22nd was the cause of her neurasthenia. I certainly think that the accident described to me would have produced neurasthenia in a person previously healthy and without any tendency to neurasthenia; and a person suffering from diseases of the various organs as plaintiff did, would have neurasthenia in less time than that. It would be a very inexact and exaggerated idea to say that fright alone may cause the development of the chain of nervous symptoms seen in cases suffering from neurasthenia. Fright alone would not do that. I do not think it is true that in accidents such as occur on railroads and in which an individual may receive but a very trivial injury, is often followed by the development of nervous prostration, or neurasthenia, and that the fright and demoralization of the patient rather than the physical injury is responsible. It is my impression that nothing could be responsible for the injury but the accident. A nervous person, if kept in a state of nervous excitation, would be aggravated, and the settlement of that condition of nervous excitation would favor a recovery. It is a fact that the conditions which aggravate a patient's nervous condition when removed assist in the patient's recovery. The

recovery of the patient after an operation is what most any doctor or surgeon would look for and try to bring about. I do not say the patient would recover under those conditions, as he might die; but the operation would be a factor in his recovery. The recovery would depend altogether upon the condition of the patient; and my opinion as to whether he would recover, would be governed by the conditions existing at the time. Usually the incidents to change of life, brought about by the removal of a woman's ovaries, will be gone through with in from 2 to 5 years; but sometimes a person may be suffering from a chronic nervous trouble or organic disease and recovery is deferred. Those changes are not brought about so simply and quickly. If a person was perfectly well and had no organic trouble, it would be a rule that such person would recover in from two to five years from the changes brought about by the removal of the ovaries. It is largely true that nervous prostration or neurasthenia developing after a railway accident, associated with fright and demoralization of the patient, is a favorable case for recovery if the patient is placed under proper conditions, and all causes of anxiety and worry are eliminated. Whether or not it is a fact that all such cases do recover unless they were, previous to the accident, hopeless neurasthenics, or suffering from serious organic disease, or unless the actual physical injuries sustained at the time of the accident are great enough to produce injuries so serious that the patient and her attendants are immediately aware of the fact; in other words, whether it is true that a patient suffering from neurasthenia, the result of a slight accident, a considerable amount of fright practically always recovers under proper conditions unless the patient previous to the accident was a hopeless invalid, would

depend upon the conditions that existed at the time, regardless of how those conditions may have been brought about. I do not call my answer an affirmative or a negative answer to the question propounded; but I try to answer the question as the case presents itself to the mind of a surgeon, irrespective of the theoretical question. The question is pretty long and I may not understand it. Quite a large percent of such cases do recover unless they were, previous to the accident, hopeless neurasthenics. It is frequently the case, generally understood by surgeons the world over, that a patient suffering from neurasthenia or nervous prostration, is so demoralized and lacking in judgment and suffers so intensely that he or she is usually willing and anxious to try any treatment suggested, even a surgical operation. Some surgeons give the warning to their fellow surgeons against making the mistake of promising neurasthenic patients cures from their various distressing symptoms by surgical operations in cases of women who are distinctly neurasthenic and who have been neurasthenics for years; but patients who have suffered for a few months or a few years from a great variety of ills are not neurasthenics and are not suffering from neurasthenia. A great many such cases are not neurasthenics and neurasthenia has nothing to do with it; but it is the result of long suffering and a prostration of the nervous system. I think that traumatic conditions were directly responsible for the necessity of the operation on plaintiff. It is sometimes the case with neurasthenics that the patient is so demoralized and the symptoms they describe are so misleading that they unintentionally misrepresent their symptoms and thus are apt to mislead both themselves and the doctor. I do not think it is true that a patient suffering from neurasthenia is to all

intent and purposes, and from a medical standpoint, suffering from a degree of insanity and moral irresponsibility. In other words, it is not true that they are unable to think clearly and logically and that their judgment is poor and they are prone to agree to anything suggested by the doctor. If a person has suffered for years from neurasthenia and has some nervous disturbance not related to other organic diseases, it is likely the case that they are so wretched they even become desperate and are willing to submit to almost any kind of treatment that promises them any relief, where they have been around doctors and quacks and nearly everybody else. If the case is such a case as I have described, with pelvic trouble, it is the most natural thing in the world for a doctor to offer to relieve the patient; but if the patient is a regular neurasthenic, accompanied with other ills, it would be foolish to offer such relief by a surgical operation. Nearly all of the plaintiff's symptoms could not be accounted for by her neurasthenia or nervous prostration. Her pelvic condition was an enlargement of the tubes and the pelvic organs were involved in the way of adhesions, which were of comparatively recent date, as determined by operation. I could not have determined that by an outside examination. I could tell the conditions of the adhesions from the history of the patient, but there were other things we had. We had a knowledge of suffering, the soreness and tenderness by pressure over the abdomen. I made the examination and test with the plaintiff lying in her bed at the Bexar Hotel, and made it afterwards with her standing. Where conditions are possible, the best way to make an examination to determine such troubles, the patient is examined both ways and in every way to determine where there is a difficulty;

but the best way to determine ovarian troubles is through the rectum, and I made such examination of the plaintiff. I did not make the rectal examination while plaintiff was standing up. I made the examination of her body and spine while she was standing up. I moved both of plaintiff's ovaries. Her ovaries were enlarged and diseased by what is known as systic degeneration. The ovaries and tubes were very much swollen and enlarged. There were no indication of germs, and there would have been nothing to examine for germs. I made no examination whatever for germs. I have stated all the examination that I can think of which I made. I made no sort of microscopic examination; and I do not think such an examination ought to have been made, as there was nothing to make it of. It is not regarded as bad surgery to remove the ovaries of a young lady, when it is necessary; but it is good surgery when necessary. By being "thoroughly diseased" I mean that plaintiff's ovaries were filled with little watery cysts or watery tumors. The tube was not filled with cysts, but was enlarged by the adhesions which for a long time had been altering its functions. I presume months would come nearer describing the length of time the adhesions had existed than any other period of time. From the history the plaintiff gave, and from the readiness with which the adhesions were removed, the conditions I found could have been traced, as I traced them, to the accident five or six months previous. When an organ is ligated or compressed with these adhesive bands its function will very soon undergo a change, and if that condition is kept up the structure of that band will also change. The plaintiff's fallopian tubes were very much enlarged and inflamed; and involved in the same inflammatory pro-

cess that the other tissues were; and some of the little watery cysts were scattered around, minute cysts of recent formation. Her womb was slightly enlarged and retro-flexed, and her left ovary was also displaced. The womb was pushed back and turned under to quite an extent; enough to be a source of probable constipation and more than likely some bladder symptoms. From the history that I had from plaintiff, she had had no trouble with her womb up to the time of the accident. After the accident all these troubles followed, and I traced the troubles to the accident. Lots of people take patent medicine for all sorts of imaginary ills. That the plaintiff had taken patent medicine would not imply that there was something the matter with her organs. She would not have taken patent medicine for that purpose unless she had some idea of her own or somebody had told her that she was taking the medicine for that particular trouble. Her mind would have been on that subject. Such germs as gonococci will cause inflammation; but there were no germs involved in plaintiff's case, and no history of anything of that kind. There was no reason to make any microscopic examination because all the inflammation was within, in the omentum, the fat overlying the whole of the intestines, the viscera. There would not be any germs unless they came from the intestinal tract; and if they find their way out of the intestinal tract they will originate a great variety of septic forms of inflammation. But the germs had not gotten out and there were no germs there. There could be a different character of disease there without some germ of some kind; but there was no germ there. It is my opinion from my examination that there was no germ there to produce the condition of plaintiff and nothing else could have produced her con-



dition except the blow, as there was no indication of anything else. A specific form of inflammation is abscess that forms in the tube first thing before it reaches anywhere else; and a little later it involves the ovaries and you get a pelvic abscess which is accompanied by high fever; which abscess will break and the life of the patient very much jeopardized. I think that the injuries the plaintiff claims to have received were the cause of the condition of her ovaries and appendix, and I do not attribute them to anything else. It is possible to have all sorts of the gravest kind of abdominal injuries without having any external evidence of them at all. The plaintiff does not know how she was hurt; but if the places indicated were the only bruises that plaintiff received, I suppose it would be difficult to explain all of her inflammatory condition in that way. It would be next to impossible to produce injury severe enough to be shown by the pelvic bone; and it frequently happens that injuries to the abdominal wall may occur while the intestines are in such order as will produce very grave consequences. I have had a great many cases where no external evidences were apparent and sooner or later the patient was taken by general peritonitis and either died or an operation was necessary. The blow produced the peritonitis, and it would communicate itself to the ovaries. I think that 35 years of experience along this line would enable me to state that a blow in the stomach will produce an injury to the ovaries. I would not undertake to state exactly the authors who hold the same thing, but I can produce them if necessary. I can recall that Dr. Devers, Professor of Anatomy of the University of Pennsylvania, gives a recent instance where the appendix may be dislocated from traumatism, on the abdomen mostly, but anywhere on the body. The womb is

protected by almost everything in the body, but falls are calculated to carry the injury to those places. The womb is movable in every direction, and its tendency is, by severe jars, to get displaced. If the womb is decidedly out of place or the ovary or both of them are out of place, and if it is not removed it begins to produce the diseased processes. In the outset there is most assuredly other proper treatment than the surgeon's knife. A blow that would produce injury to the womb would not have to be such a blow as would render a person unconscious; but it frequently happens from jars of the body, and ovarian troubles result in the same way. Displacements of the womb, as a rule, are not so very painful unless they are exaggerated. The ovary may be displaced; and when it is displaced, there is no treatment that, as a rule, has any effect upon it whatever; and it cannot be replaced and the ultimate outcome of that displaced ovary is its removal. In other words the surgeon's knife is the ultimate outcome of a displaced ovary. If the ovary is not taken out it becomes involved in these adhesions, and later on is involved the consequences which follow these adhesive bands; and it is the generally accepted theory that the surgeon has to use his knife or the patient will die. I think it is often the case that a woman might receive injuries and not notice them at the time; but that if it was a serious accident the party would find out her injuries pretty soon, as plaintiff did; though she would not know it at the time necessarily. I do not think plaintiff would have known she was injured immediately; but I think that in the excitement of an occasion such as in the case of plaintiff, she would not have felt the pain for some time; and a person could sustain a grave injury without feeling it at the time being. It is very likely that all the



things plaintiff complains of could have happened and she not feel any pain. It would be much more difficult to dislocate a healthy organ than one that was somewhat diseased. I think the plaintiff has improved in her health very decidedly. I think she is less nervous than she was; she is stronger than she was; she has not that same palor; her blood is improved, and her general condition has improved. I would not have been disappointed in the result of the operation, no matter what the outcome of the case had been, whether the plaintiff lived or died. I do not think the condition of Miss Hill's ovaries and tubes could have been due to disease and a broken down state of health; as she was perfectly regular in her periods up to the time of this accident; and on the fifth day following that accident the period was very scant and lasted only one or two days. I do not think the plaintiff would have improved under treatment. I did not treat the plaintiff. I gave her one prescription and she went away and stayed over a month, and then came back and went home to meditate as to whether she would undergo an operation. The prescription I gave plaintiff was a tonic—quinine or something of that kind. The object of that was to strengthen her nervous system. I did not give that with a special view of an operation, as I did not know whether I would ever see her again. She could not have been cured without the use of the knife because those are matters which are incapable of being relieved any other way. Operations for appendicitis are very usual. The appendix is supposed to have a function; and some doctors assert the theory that it has some connection with the blood. I do not think that the condition of the plaintiff's tubes and ovaries is the result of a run down state of health, and I am very certain that an improvement in her general

health would not have improved the condition of her tubes and ovaries. I think the operation was not only justifiable, but urgently demanded, as the general condition of her system being clearly due to those conditions. It is impossible to get improvement beyond a certain point by treatment in cases such as plaintiff's. If you can put them to bed and subject them to a certain treatment they will improve for a little while, but as soon as they get on their feet these troubles will return. It is not better for a surgeon, if his patient improves under treatment, to continue that rather than to have the patient unsexed, when he knows that the relief can be only temporary. It is usually the case that improvement under treatment is only temporary; and in the nature of things would be only temporary from any sort of treatment unless it be a surgical treatment. The reason I did not get information from Dr. Dale regarding his treatment of the patient, but went ahead and performed the operation, was because I based the necessity of an operation upon the strength of my examination of plaintiff and upon my experience in such cases; and I decided upon that plan and theory entirely upon my own judgment in the matter. When there is any specific improvement in a patient it is the proper thing to continue the treatment; but when a physician knows, from his own experience, that any kind of treatment will afford only temporary relief, it is foolish to jeopardize the patient's future health and life by further delay. The case was presented to me and I examined the plaintiff and gave my opinion as I usually do. I do not think it would have been better to have sent this young lady to the hospital and continued the treatment given her, as I know it could not have helped her; and especially when I knew that such relief was only

temporary and by delay the patient's life is jeopardized. I did not state that I did not know what was the condition of plaintiff's organs until I opened up the abdomen; but I stated that I examined her carefully and found the tissues about the womb were inflamed and tender and sore, and I found a degeneration in the tissues all about there, and enlarged ovaries. I found those conditions from an external examination. I could not tell about the adhesions, except from the examination I made I knew that adhesions existed; but I could not tell about them by feeling.

#### RE-DIRECT EXAMINATION.

I am acquainted with Dr. Williamson of Pearsall. He brought the case to me. He is a reputable practitioner. I suppose he is a regular graduate. His health is very precarious and has been for months. I diagnosed plaintiff's case before I cut into the abdomen; and when I cut into the abdomen my diagnosis was verified. Dr. Berry examined the plaintiff with me. Dr. Williamson is now suffering from multiple neuritis, and has been in bed a great part of the time for 5 or 6 months. Dr. Taylor was with me and gave the anesthetic when I made the examination of plaintiff. I did not refuse to let any surgeons from the railroad company be present at the operation; but Mr. Chew wrote me and I did not answer that letter, as I did not have the right to say whether they should be present. I did not answer Mr. Chew's letter because I did not want to become involved in the matter. He wrote asking me a number of questions, but I never refused to answer them.

PLAINTIFF'S EVIDENCE IN CHIEF.

DR. RALPH REDDITT, having been recalled, testified as follows:

CROSS-EXAMINATION.

I have been practicing medicine for many years; but quit on the 25th day of August, 1910. I have never prescribed for the plaintiff. I have not seen the plaintiff walking around Pearsall quite a lot; but I have seen her walking around once or twice. I suppose I have seen her walking around within the last month or six weeks. Before that time I saw the plaintiff in an automobile once. I was not present at the last term of Court. I do not know whether the plaintiff was at the Fiesta or not.

RE-DIRECT EXAMINATION.

Before the accident the plaintiff was the picture of health and she has always been. Since the accident she has been the reverse.

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PLAINTIFF'S EVIDENCE IN CHIEF.

E. D. WINDROW, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is E. D. Windrow. My home is at Pearsall, Texas, having lived there about four and a half years. I am a druggist. I have talked to Mr. Chew, the Claim Agent for the Texas & Pacific Railway

Company, and that company had me summoned here as a witness in this case and then agreed that I might be discharged. I know Miss Clara Hill, the plaintiff here. She worked in the drug store with me about three months. She worked there before the accident. Her condition seemed to be all right to me, and she appeared to be a strong healthy girl. She did not take a great quantity of patent medicines and all kinds of stuff. Miss Hill looks a great deal worse now than she did then. She took no medicine at all that I know of while she was working in the drug store.

#### CROSS-EXAMINATION.

My business in the drug store is to fill prescriptions. I am a pharmacist, being a graduate of Baylor Medical College at Dallas. I begun to put up prescriptions about ten years ago. Miss Hill was not in the drug store just immediately preceding her visit to Queen City; but I think she was there in 1909. I saw her in 1911 and 1912 frequently, around town and sometimes in the drug store. I put up prescriptions in 1909 and 1910. I am 29 years old. Miss Hill worked at the Mercer Drug Store, about a block from the depot at Pearsall. I do not know where Miss Hill worked in 1910 and 1911, but she worked for the Melon Mercantile Company for a while. The Melon Mercantile Company is three or four miles south of Pearsall. I have also seen Miss Hill walking around town this year. I have never seen her fall on the street or in the store this year nor last year. I do not remember seeing Miss Hill any time from Christmas 1911 down to August following; I have seen her frequently but I do not recall any particular time. I do not remember when she came home from

Queen City; and I could not be positive about when I saw Miss Hill. I have seen Miss Hill every year I have been at Pearsall, but I do not know just what time of the year I saw her as I paid no attention to the matter. I do not remember when Miss Hill came to San Antonio to have an operation performed.

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### PLAINTIFF'S EVIDENCE IN CHIEF.

MISS MAMIE HILL, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

My name is Mamie Hill, and I am a sister of the plaintiff in this case. I remember accompanying her on a trip to Queen City from Pearsall in December, 1911. My little nephew, who is about 12 years old, also accompanied us. We were on a Texas & Pacific train which ran into another passenger train on a side track. There was a great collision at the time, causing quite a good deal of excitement among the passengers and threw several of them from their seats. I was thrown right down in the aisle. At the time I was preparing to get off the train and was standing before a little mirror putting my hat on, and the shock sent me several feet down the aisle, causing me to fall. My sister, the plaintiff, also fell, and several people fell on her. She was seated at the time of the collision. I got up first and assisted my sister up. When I helped her up she seemed to be stunned at first; and I helped to her seat and asked her if she was hurt and she replied that she thought she was. A little later I went out of

the coach to see the wrecked engines with some other ladies; and came back and told my sister about it, and she wanted to go out also, but I protested; she insisted, however, and in an hour or so after the wreck she went out and looked at the engines. My sister was very fatigued, and by the time we arrived at Atlanta she seemed completely given out. She looked like she was about played out, and I was uneasy about her at the time. My father met us at Atlanta and took us home. When we arrived home dinner was ready; and we tried to get the plaintiff to eat something but she became sick and we put her to bed. For the next two or three days she was nauseated and vomited continually; and up to the time she was taken to Texarkana she lost considerable flesh. I went with her to Texarkana. We carried her on a cot and Doctor Strong accompanied us. Dr. Strong is now one of the Texas & Pacific Railway Company's local surgeons; but I do not think he was connected with the railway company at the time he went to Texarkana with us. Dr. Strong suggested taking the plaintiff to Texarkana as a last resort. The plaintiff was at Texarkana something like two weeks. At the end of that time my mother and I went to Texarkana after my sister, the plaintiff; and Dr. Dale told us she could not leave, but she was dissatisfied because she was among strangers, and he finally consented for her to go home and stay awhile and come back again. The night we got her back home she was just as sick as on the day we took her to Texarkana, and Doctor Strong was with her all that evening and all that night. My sister and I had only ten days' leave of absence when we left Pearsall. I stayed in Queen City until the 15th day of February. I remained that length of time because my sister's condition was such that I could not leave her. I asked the doctor



about it and he told me not to leave. I afterwards came home on February 15th, and did not see my sister again until she came to San Antonio where I met her. We remained in San Antonio a day or two and then went on to Pearsall, as my sister desired to make a visit there. Up to the time of the operation the plaintiff was up and down; she would take treatment from the doctor and seem to improve for a day or two and be able to go about, and then she would get down again. I think Mr. Chew, the Claim Agent for the Texas & Pacific Ry. Company was in Pearsall once or twice while my sister was there. Before the accident in question my sister's health was excellent, and she had less use for medicines than any child in our family, and had less use for doctors. My mother has nine children. The youngest is five years old and the oldest is 29 years old. The health of all my mother's children, general speaking, is good.

### CROSS-EXAMINATION.

When the wreck occurred I was standing up, pinning my hat on. I was sitting right opposite my sister, and I was standing up at the time the accident occurred. When the collision occurred I was thrown forward, much further than my sister because I was standing. My sister had completed her toilet and had her hat on. The seat in front of my sister, was turned forward; and as well as I remember there was someone in it. The seat was not arranged so that whoever was in it would face my sister. I have no idea who was sitting in front of us, nor who was behind us. A lady from Palestine was on the seat with me; and I think her name was Mrs. Brown. When I picked my sister up she had been thrown across the aisle between the chairs, and underneath



the chair. I think her face was down, although everyone was very much excited and I remember very little of the conditions there then. I picked my sister up before she attempted to rise and placed her in her seat. When I picked her up she was lying with her stomach down. I do not know if that is the way she fell, but that is the position in which I found her. I do not remember now whether I was sitting on the right hand side or the left hand side of the aisle, but I know we were sitting opposite each other. My nephew was sitting in his seat beside my sister at the time of the collision. He was sitting next to the window and my sister was next to the aisle. My sister did not show her nervousness until we got her home at Queen City. We reached Queen City about 12 o'clock. It was not about 9 or 10 o'clock when we left Atlanta for Queen City. We arrived at Atlanta about 9 or 10 o'clock, but we were delayed there waiting for the hack. I was somewhat shaken up at that time. I was not so nervous, but I was stiff. I did not feel my soreness and stiffness much until the next morning. Of course, I was very much frightened and very nervous at the time of the collision, but not to any great extent. I was told that there was one woman in the car we were in at the time of the wreck who was seriously hurt. She had her back hurt and they assisted her back to the Pullman to a berth. She was a large lady. None of the children in our family required much medicine or many doctors. The only ills they had were whooping-cough and so on; and I am the only one of the children that required treatment from a doctor. Doctor Strong's medicine quieted the plaintiff for awhile. It was at Dr. Strong's suggestion that the plaintiff was carried to Dr. Dale's sanitarium at Texarkana. Dr. Strong did not say that the plaintiff needed rest more than

anything else, but he told us to keep her quiet. When the plaintiff and I got out of the coach to go look at the engines that were wrecked, I helped her off the steps of the car by taking hold of her arm. I got down first, and took the plaintiff by the hand and assisted her along, and we walked together to the engines. I do not know just how far it was as I paid no attention to the distance, but it was not a great distance. The wreck was out in the woods. I do not know just the location of the wreck, but I was told it was at Kildare. It was a strange land to me, and I did not know anything about the surroundings. I did not see a depot nearby, and I paid no attention to the country until we reached Atlanta. After getting out of the coach, we stood looking at the engines a few minutes, and then I took the plaintiff back to the coach, and she never got out of the coach any more until we arrived at Atlanta. My father had heard of the wreck before we arrived at Atlanta and had taken the first train he could get to Atlanta; and he had just gotten to Atlanta when our train arrived there. When we arrived at Atlanta we left the plaintiff at the depot to allow her to rest, and then we went to a restaurant and waited until my father could get a hack. He telephoned to Queen City and got his own hack and took us to Queen City. We were in Atlanta about an hour waiting for the hack; and it was about dinner time when we arrived at Queen City. It is about 2 1-2 or 3 miles from Queen City to Atlanta. I went to Texarkana and brought my sister back from the sanitarium. I did not go back to Pearsall immediately after bringing her back from Texarkana; but I remained in Queen City until the 15th of February. She came back from Texarkana about the 5th or 7th of February. My father put the plaintiff on a through train at At-

lanta and she came to San Antonio by herself; and I met her in San Antonio at the I. & G. N. depot. I met her in San Antonio because I was afraid she could not make the trip to Pearsall alone. I suppose the same sleeper that brought her to San Antonio goes to Pearsall; but I wanted the plaintiff to stop in San Antonio in order to be examined. I did not have her examined at that time. I did not consult a lawyer, and neither did she. If she sent some one else to consult a lawyer when she was here at that time I did not know it. Nothing was said in my presence, that I know of, either by her or her friends and relatives about consulting a lawyer. I did not have the plaintiff examined when she arrived at San Antonio because she protested against it and wanted to go to Pearsall first. I came from Pearsall to San Antonio at that time by myself. I did not have anything to do with getting a lawyer. I do not know what Mr. McKinley, my brother-in-law, did. I do not remember that he went to see a lawyer; but it seems to me that he came up the day I did or the Sunday following. I do not remember seeing a lawyer on that trip. I left my sister in San Antonio as I had to go back to my work. I left her at the Bexar Hotel; but no doctor was in charge of her. I do not know what arrangements she made with her lawyers at that time. I did not think she was able to go to Pearsall when I went, so I left her in San Antonio and she came down the following day with some of my friends. One thing that brought me to San Antonio to meet the plaintiff was that I was very anxious to see her; I had not been with her a week before; but I had not seen her since the 15th of February, and we met in San Antonio about the 4th or 5th of March. When the plaintiff arrived at San Antonio she was able to be up and about, but she

was very weak. We got on the street car at the depot and went to the Bexar Hotel, and I don't think she left the room that evening. I did not go to Pearsall and hold my sister's job for her until she could return, but I had a position of my own to fill. I did not make any arrangements for my sister, the plaintiff, to hold her position for her; but another sister held her job. That sister is here and can testify as to the arrangements made in that connection. My sister told the plaintiff she would hold her position for her as she was a clerk herself. Miss Clara Hill, the plaintiff, did not send me to Pearsall, but I came on my own account; and I came to meet her in San Antonio on my own account. I did not know that the plaintiff was in great distress and for that reason came to San Antonio to meet her. It was natural that I should meet my sister in San Antonio as I was anxious to see her; and we wanted her to stop over in San Antonio. We did not see a doctor while she was in San Antonio; but she was completely worn out and said she wanted to come to Pearsall first. The railroad company, I think, extended her ticket which she had bought at Atlanta so that she could use it the next morning instead of continuing the day of her arrival. I stated before that my sister, the plaintiff, sent another sister to Pearsall to take her position; and that sister is still holding the plaintiff's job down. I was here all day Sunday with my sister and returned to Pearsall Sunday night. We did not visit any doctors while in San Antonio and I do not recall mentioning any lawyers or damage suit. Mr. McKinley did not come to San Antonio with me; but I think he arrived on the 2 o'clock train. The plaintiff and Mr. McKinley came back to Pearsall the following day after her arrival in San Antonio. I think they came to Pearsall on Monday.

## RE-DIRECT EXAMINATION.

Before the accident the plaintiff never complained of her back at all; and she was as straight as any young girl. Since the accident there is a decided change in her hip and she complains constantly of her back. I can see the curvature in her spine myself with the naked eye, and the difference in the hip is also visible. I am the only one in our family that has received treatment from doctors; the balance of the children are healthier than I am.

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## PLAINTIFF'S EVIDENCE IN CHIEF.

MRS. GEORGIA HILL, having been duly sworn, testified as follows:

## DIRECT EXAMINATION.

My name is Georgia Hill. I am about 49 years old. I am the mother of Clara Hill. I have nine children. I had seven girls, one of whom has died, and two boys. My youngest child is a girl of five years old. My husband is a farmer, living at Queen City. I remember very well the occasion of my daughter arriving at Queen City in December, 1911. When her father drove up in the hack with her we had to carry her into the house. I asked her if she was hurt and she replied, "Yes, I am jarred up considerable; I am not seriously, though, I don't think." We had dinner ready, and every one came to the table and ate except the plaintiff. She began to grow weak and faint and I prepared the bed and she lay down and stayed there about six weeks before

she was able to get up much. She grew worse all the time. She took a nervous prostration, and was drawn in her hands and could not open them at all. Her face was drawn down and there were great knots all over her. We telephoned Dr. Strong, but he was gone, so we got the other doctor there; and just as soon as Dr. Strong returned we had him. The other doctor said he didn't consider she would live and he gave her a hypodermic and finally got her resting that night. Dr. Strong had her case and I thought she would get better, but she would get better and then worse, and it continued that way as long as she was at Queen City. Dr. Dale pronounced her perfectly whole. That constant vomiting I thought was caused by an internal hurt and I told Dr. Strong so and he said he did not know, and I believe he was speaking the truth and that he did not know. We took her to Dr. Dale and he said it was just a nervous break-down of some sort. I could not say exactly how long the plaintiff was at Queen City; but it was from the 22nd or 23rd of December up until along in March sometime. Then she came to San Antonio. She became better and we asked Dr. Strong if he did not think it would help her to come to San Antonio and he said he thought it would. We asked Dr. Strong if he thought she could stand the trip, and he kept doctoring her along and she seemed to be better right then than she ever had been. Before the accident the health of plaintiff was perfectly good. She had never had any ills at all that I heard her complain of; and had never had a doctor to prescribe for her and had never taken any medicine from a doctor since she was two years old. We lived in Pearsall 22 years and all the doctors there will tell what they have done for her, and they never filled any prescriptions for her. Before the accident there was nothing

at all the matter with her back and hip and her form was just perfect as far as I could tell. I have noticed a deformity in her hip now, and I have noticed it ever since she was hurt in the wreck. I examined that myself to see if I could locate it. She complained of that side and hip and her back, and back here (indicating) and in the neck and spine.

### CROSS-EXAMINATION.

Dr. Strong is our family physician. We got him after we had been living in Queen City about six months. He is regarded as one of the leading physicians there. He is a fine doctor, I think, and a fine man in every way. When my daughter arrived at Queen City I made an examination, as I thought she might have some bones broken. I found nothing except that her hip seem to be up some. Of course, I could not tell about her back. I believe her back is offset and I have believed it all the time. It was slipped out of place and I noticed it at the time. I told Dr. Strong about the condition of the back and I told my neighbors about it. I won't say for sure that I told Dr. Strong about the condition of the back; but I did tell him about her stomach and I told him I thought she was hurt internally. I am pretty sure I said something to Dr. Strong about the plaintiff's back. I do not know whether or not I called Dr. Strong's attention to anything the matter with plaintiff's hip. I discovered that plaintiff's hip was offset, and I thought it was hurt in some way. I thought it was hurt because she was in the wreck. She was suffering very much and complaining so much. She complained of a hurt in her hip; and I think that she told Dr. Strong of it in my presence. Plaintiff also complained of hurts along the side of



the hip and in her back and side. I think plaintiff had a few bruises or blue places. I cannot remember where they were, as she had them along over her in spots. When I found plaintiff was in the wreck I made an examination of her. Plaintiff told me she was in the wreck. She did not tell me she was not hurt at all. I did not hear her tell Dr. Strong that she was not hurt at all. I was not present all the time Dr. Strong was present. I sent for Dr. Strong to tell us what was the matter with plaintiff. He did not know what was the matter with her. He treated plaintiff the very best he could, and I believe he did all he could for her, but he did not get her up, but took her to Texarkana. Plaintiff was kept at Texarkana about two weeks. We insisted on her staying longer, but she was so dissatisfied she would not stay. I suppose the doctor treated the plaintiff for the vomiting and the aches and pains. The doctor said she had something like nervous cramps; and she would die off and be perfectly dead apparently. I did not send for some other doctor before I got Dr. Strong, but Dr. Strong was the first I sent for. I did not send for another doctor to come and treat the plaintiff. Another doctor in town did not come and treat her and give her a dose of medicine, but Dr. Strong gave her her first dose of medicine. After that we wanted Dr. Strong one night, and he was gone, so we got Dr. Roach to fill his place, and she had one of those cramping spells as I have described. Every leader in her was drawn and we could not straighten her at all. Dr. Roach did not give her anything but a couple of hypodermics and that helped her and quieted her. He did not give her a dose of calomel or anything else. I won't say that plaintiff did or did not vomit before Dr. Roach came to see her. She did not vomit after taking Dr. Roach's



medicine, as he did not give her any medicine. He gave her a hypodermic, but she had vomited before that. It is not true that plaintiff did not vomit at all until Dr. Roach came and gave her a treatment. Dr. Strong told us that plaintiff was suffering from and intense case of nervousness and needed a good rest and quiet; and we all knew she did from the fix she was in. He advised us to let her alone and to give her a quiet treatment, and she did get that quiet. I do not know that Dr. Strong said that she was not getting that quiet that she needed and suggested that she be removed from the family and be placed where she could get quiet and rest. That is not practically what he advised, but he advised us to take her to a physician that he thought would do her more good than he could do. I give Dr. Strong the place of all because he did his best. I did not say that Dr. Strong's diagnosis of plaintiff's case was that of extreme nervousness and that she needed rest and quiet and a doctor that would do better than he could. I said something similar but I did not say those words. I did not go with the plaintiff to Dr. Dale's sanitarium, but I went to Texarkana with my daughter Mamie when the plaintiff was seeking to come back to Queen City. I did not want to go because I knew when I arrived there the plaintiff would want to go home and I wanted her to stay as long as she could. I talked to Dr. Dale, and he told us she wanted to go home, and that he thought it was best for us to take her home and then let her go back again. He advised that because the plaintiff was nervous and because she wanted to go and her mind was on going home. The plaintiff did not come back to Queen City improved, but she came near dying the night we brought her back. She sat up all night in the room by herself just before we brought her

back. I know that because I have her word for it and her word is as true as the Bible. I saw the plaintiff the morning that I went to Texarkana to see her. I went up one morning and stayed up there all night and came home the next morning. I stayed in Texarkana a day and a night. I saw Dr. Dale the first night I was in Texarkana, but I did not see him the morning we left, as I went to the depot and the plaintiff was sent down. After we arrived home the plaintiff had one of those spells and we had Dr. Strong with her all night. She did not improve after that for 8 or 9 days, after which she began to improve, and I suppose she gained some in flesh, but very little. She improved enough for her to leave and come to San Antonio. When she came to Pearsall she did not intend to take her position back which she had sent her sister to fill, but she intended to take her position back when she was well. I allowed the plaintiff to go back to Pearsall simply because Dr. Strong told me that there was so much malaria at Queen City he thought she would do better in a dry climate, and that he thought it would be best for her to go to Pearsall where there was a high, dry climate. I concluded to let her come to a dry climate after she returned to Queen City from Texarkana, because she has a home in Pearsall as well as in Queen City. I did not know that my daughter was suffering with female trouble. I did not tell Dr. Strong that I wanted him to treat the plaintiff for female troubles. Dr. Strong asked me if the plaintiff did not have female trouble, and I did not suggest it to him at all. After Dr. Strong asked me whether the plaintiff had female trouble he then asked the plaintiff. That was after she was hurt and before she went to Texarkana. I did not tell the plaintiff I wanted Dr. Strong to examine her for female trouble; nor did I tell her I

wanted to have some doctor examine her. I did not discuss with the plaintiff the matter of bringing a suit for damages. I did not know that plaintiff had come to San Antonio with the intention of employing a lawyer; and she did not come with that intention. She thought all the time that Mr. Chew would settle with her like a man and never thought about a suit and never mentioned it for a long time. Mr. Chew came to see the plaintiff several times. She did not ask him to come, nor did she have anything to do with communicating with him. The question of settlement was not discussed at all until Mr. Chew came to my house. I could not tell how long after the accident it was before Mr. Chew came to my house. Both the plaintiff and my daughter Mamie discussed the matter of settlement with Mr. Chew, but I did not have anything to say. When Mr. Chew was present the question of settlement was discussed while my daughter was sick; and after he left a few words might have been said about the matter; but we thought more about plaintiff than of settling. That the plaintiff was injured was not the first thing I thought of. I did examine the plaintiff to see if she was seriously hurt; and I did that because she was in the wreck.

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#### PLAINTIFF'S EVIDENCE IN CHIEF.

Dr. John O. Kemp    having been duly sworn, testified as follows:

#### DIRECT EXAMINATION.

My name is John O. Kemp. I am a graduate of the University of Texas, Galveston, Texas. I grad-

uated in medicine in 1907, and have been practicing medicine during the six years since then. I was called upon to assist Dr. Kingsley to assist in an operation upon Miss Clara Hill, the plaintiff herein. I had given no advice as to the necessity for that operation previous thereto; and all that I know of the plaintiff's condition is what I found after opening the cavity. After the belly was carefully opened, we found the appendix somewhat club shaped and larger than normal and having adhesions which separated fairly easily, and showing an inflammation present; it was also bound down by adhesions. We found the right ovary enlarged and diseased and bound down by adhesions. It was so diseased that it had to be completely removed. The right tube was inflamed and also bound down by adhesions and swollen. On the left side the left ovary was enlarged, inflamed, swollen, bound down by adhesions and prolapsed or dropped down in the pelvis; and also so diseased it had to be removed. The left tube was swollen, enlarged and bound down by adhesions. The womb was turned backwards. Dr. Kingsley was the physician doing the operation. The conditions I have described were plain to be seen. The conditions we found required an operation such as was performed. In other words, Dr. Kingsley's diagnosis was correct. I have had occasion to examine the plaintiff since that time, and I find her left hip higher by an inch than the right. I also find, about the last lumbar vertebra, a little deflection to the right. If the subject under discussion was in good health up to the time she was in an accident, and after the accident the troubles and conditions I have described developed, I would say the troubles were caused by traumatism. By traumatism I mean some

injury. If the subject were in good health up to the time of the hurt and after the hurt, the troubles developed the professional mind would at once conclude the troubles were caused by the injury received. The plaintiff is in serious condition; and her condition is permanent so far as the hip and back are concerned. The removal of the ovaries of a woman unsexes her and produces all kinds of nervous disorders. There is no question about the removal of a woman's ovaries unsexing her and no question about that condition being permanent.

### CROSS EXAMINATION.

I made no examination whatever of the plaintiff prior to assisting in the operation, and made no diagnosis of the case; but I was invited by Dr. Kingsley to assist in operating upon the plaintiff. I am not frequently called in cases such as this by plaintiffs in personal injury suits. This is not my first case; but I am not called in quite often. I do not remember how many times; but they are few. I call eight or ten times a few times. I have testified about eight or ten times for plaintiffs in personal injury suits, and I have also testified for defendants in such cases. I testified for the San Antonio & Aransas Pass Ry. Co. some time ago. Dr. Jackson was consulting physician at that time for the railroad company. In cases where a woman's organs are diseased it is necessary to remove them entirely; and when it is decided upon by the surgeon it is necessary to remove them. It is a rule recognized by our profession and by medical writers that a woman's ovaries should not be removed unless conditions indicate. Some authorities claim that a woman's ovaries should not be removed. Most authorities are

against the removal of the ovaries provided one sees it is not necessary to do it. The plaintiff's left ovary was more diseased than the right ovary. It had undergone changes to such a degree that the normal tissues had been destroyed, and it was impossible to say whether the ovary would again carry on its functions. It was in such condition that if a part had been left it would have produced other conditions which would cause other troubles to arise and necessitate the patient undergoing a second operation. The left ovary was enlarged and diseased by having little cysts on it, and bound by adhesions to the omentum and the tube. The tube is connected to the ovary. The ovary was adhered to the tube and connected with it. The ovary was also adhered to the bowels, and was prolapsed down in the pelvis. The womb was turned backwards also. It is true that doctors, learned in the profession, do open the cavity and remove adhesions. It is also true that a young woman's ovaries are naturally and necessarily enlarged every month. It is evidence of a healthy ovary to have one or two cysts on it every month, but not many. If an ovary has more than two cysts on it, it is not healthy. I am prepared to swear that. It is true that doctors will often open those little cysts, and they will be removed entirely. That was not the proper thing to do in this case. If a doctor operates on a young woman and finds a diseased condition of the ovaries, he will try to leave as much of the ovaries as possible. The ovaries move about from place to place according to a woman's condition. If the womb is out of place, it can be replaced by manipulation. If the ovaries are displaced on account of the womb's position, and the womb is replaced in position, then the ovaries will take their

right position, provided there are no adhesions to the ovaries and tubes. If there are adhesions to the ovaries and tubes, they may be taken out, but will reform again. So that it is not necessary to take out a woman's ovaries if only adhesions exist. It is necessary, however, to take out a woman's ovaries if they are diseased. I did say that the plaintiff's ovaries had cysts on them, but those cysts were through and through, and the ovaries were diseased and the cysts projected. Many cysts are an evidence of disease, but a few are not. Cysts can be removed, and we would do that if there were only a few. We can remove many cysts as well as a few, but that could not be done in this case. The plaintiff's right ovary was also diseased, and the right tube was in a similar condition to the left tube. In other words they were both alike. The left ovary was more diseased than the right, but I do not know how many more cysts it had on it. We did not count the cysts, as I was there to assist and not to count cysts. The adhesions could be removed and the womb can be put back in place. We could not take out the most diseased ovary and leave the other, because there is danger in leaving a diseased portion of the ovary of it creating a cancer condition. The ovaries do not touch one another, but they are far apart; and the removal of one or a part of one can be done without effecting the other, and that is successfully done all the time, but the diseased condition of the one may effect the other later. The tube may have cysts on it. Disease may injure a woman's ovaries, and traumatism may injure them. The most usual way for a woman's ovaries to be injured is by infection. Nature strives to protect a woman's ovaries; and in a great many cases nature does what



it tries to do; but the severity of the blow required to injure a woman's ovaries depends upon the strength or muscular condition of the outer walls. Some times the lightest blow will cause injury to a woman's ovaries. The blow would have to be either on the right or left side, somewhere over the abdomen. I do not know how much force would have to be used; that would vary with different cases. A blow that would affect the ovaries of a woman may be followed immediately by great pain and intense suffering or it might come on a little afterward; and I would not want to confine myself to any limit of time at all. One can never say exactly when the pain will come, unless the symptoms show themselves. If the blow is severe enough it will bring on symptoms immediately. A blow that would cause injury to a woman's ovaries would not necessarily be sufficient to crush the pelvic bone; but it would have to be quite severe. If a blow was given a woman severe enough to injure her ovaries, she may suffer pain, but other symptoms will come on later. Some women would suffer great pain at the times and others would not. That the plaintiff got up and walked around after the accident is why I say that the pain may come on immediately or come on later. I do not know whether, if the blow plaintiff sustained at the time of the accident was sufficient to cause the injury to her ovaries, she could have gotten down out of the chair car and walked around. It requires a pretty severe blow to injure a woman's ovaries. I have stated plaintiff's back was injured; but I do not know how to account for that. Her back has a slight curvature to the right. It may be true that a person can throw his back out of position by standing a long time in a certain position; and



it occurs in certain trades that the hip will be raised up by standing in certain positions. It is true that one reputable authority lays down the proposition that the trades are one of the causes for displacements of the hip and back. Displacements are one of those things that may not occur from accidents. Where a woman has suggested to her, that she has female or other troubles, to relieve them she takes any suggestion or undergoes any operation, thinking she will be relieved; that is called neurasthenia. It is well established that neurasthenia may occur in such cases. I could not say whether the plaintiff was suffering with neurasthenia as I had never seen her before I saw her on the operating table; and I will not say that neurasthenia was her trouble. If a patient is in a sanitarium undergoing treatment by a reputable physician, and she improves under that treatment, I would suggest that she remain there and go on with the treatment. Plaintiff had some fever from the adhesions. Her troubles produced nervousness and the fever would come as a result. It makes a patient nervous at once, and as soon as her mind is directed to her troubles she becomes intensely nervous and fever comes up and the only treatment for that is quiet and rest. The doctor has to treat the patient's mind as well as her body; and when the patient is relieved in that way she gets well of her nervousness. If there is any way that a treatment can be given so as to save the ovaries and not unsex the patient, that should be done; but if the patient still suffers from her pelvic organs, then of course, the treatment would be determined by the surgeon by operating. Supposing that the plaintiff was injured in a wreck on December 22, 1911, and on April 15th she discovered for the first

time that her hip joint was out of place, I would say that such a dislocation should have been looked for sooner if it had been done in the wreck. I should judge that her dislocation would have been determined by the plaintiff walking. I do not know whether the dislocation was something that could not have concealed itself so long; but that would depend upon those that examined the plaintiff. I think I would have discovered it in less time. The operation for appendicitis is not an unusual one, and injury seldom results from it unless there is pus present which has to drain out. There is danger in every operation; and sometimes adhesions obtain after such an operation. If no adhesions occur after an operation for appendicitis the operation does not amount to anything.

#### RE-DIRECT EXAMINATION.

In cases where a life is involved, and in other cases where the physician sees it is absolutely necessary, we do remove both ovaries. The surgeon in charge decides for himself in order to do the best on this earth for the patient; and in my opinion the removal of the ovaries in the case of plaintiff was the best thing for the plaintiff. I had not examined the plaintiff before the operation; and no man could have known the condition until he opened the plaintiff. The plaintiff was under the influence of ether and did not know what was going to be done to her, and the doctor could not know himself. The plaintiff had applied to some of the very best surgeons in this country. Dr. Kingsley stands right at the front of his profession in that kind of operations.

## PLAINTIFF'S EVIDENCE IN CHIEF.

The testimony of L. C. Williamson, taken by deposition, was introduced, as follows:

### DIRECT INTERROGATORIES.

My name is L. C. Williamson; my present occupation is physician. I have practiced my profession eighteen years, as follows: Sixteen years at Moore, Texas, one year at Pearsall, Texas, and one year at Elmo, Arkansas. I am acquainted with Miss Clara Hill, the plaintiff, and have known her since about April, 1912. I have not had occasion to examine and treat the plaintiff since December 22, 1911. I commenced about April, 1912, and she has been under my treatment ever since that time. When she first came to me I found she was suffering from a deformity of the hip, also pains in the hip. Afterwards I discovered curvature of the spinal column and afterwards found her suffering from appendicitis and female trouble. Then afterwards I found an operation necessary. After operating I found she had appendicitis and adhesions, and both ovaries were cystic, and it was necessary to remove them. I gave the plaintiff the proper treatment as I saw for the symptoms as they arose. I treated her for appendicitis and female trouble. I was present at the time of the operation on Miss Hill. The operation was for the purpose of removing the ovaries and appendix. The operation was performed by the advice of myself and Dr. Kingsley. After the operation I found she had appendicitis and cystic ovaries. After the operation a speedy recovery was secured. The conditions revealed by the operations were appendicitis, cystic ovaries and adhesions. At the time and

just preceding the operation, the plaintiff's condition was very bad and she was suffering a great deal, and it was necessary to perform the operation to save her life. The result of the operation proved satisfactory, and the plaintiff recovered thereafter. The plaintiff was unsexed as a result of the operation, and will be barren all her life, and can never raise a family. The injury to plaintiff's hip is a permanent injury. She can get around, but it will always be a hindrance to her. In my opinion the plaintiff will be an invalid for life; and she will not be able to perform manual labor or to engage in regular work. The plaintiff is very nervous and will always be in that condition. In my opinion the condition of the plaintiff was caused by traumatism. Traumatism, shock or violence could produce the conditions I found in Miss Hill, the plaintiff.

#### CROSS INTERROGATORIES.

I belong to the Allopathic school of medicine. I am a graduate of Louisville Medical College, Louisville, Kentucky, and have a diploma from that school. Before taking up my residence in Pearsall, Texas, I resided in Moore, Frio County, Texas. I do not know how many times Miss Hill, the plaintiff, went to San Antonio to be examined before the operation. Upon the first examination Dr. B. F. Kingsley and myself were present. At the next examination Dr. Kingsley, myself and another doctor, whose name I do not remember, were present. I did not state positively, previous to the first time the plaintiff was examined in San Antonio, that it was my opinion that she had a broken or dislocated hip joint. I did not state, in the presence of several people, that it was my opinion she had a broken hip or dislocated

hip joint. I did not state, in the presence of several persons that Miss Hill would be a cripple for life on account of her broken hip or dislocated hip joint, and that I would prove it by the best doctors in Texas. When the first examination was made in San Antonio I did not state to the doctors present what my opinion was, nor did I tell them that the plaintiff had a broken or dislocated hip joint. Miss Hill was operated upon for the purpose of removing both ovaries and on account of appendicitis. When the first examination was made of the plaintiff there was nothing said about a broken hip; but I talked about a deformity of the hip. I do not remember whether, previous to the first examination at San Antonio, I told anyone that the plaintiff had any complaint whatever except the dislocated hip joint or broken hip; nor do I remember who I told that she had any other complaint. I told Miss Clara Hill, the plaintiff, and also her sister, Mamie Hill, at Pearsall, Texas, about the plaintiff having such complaint as that for which she was operated upon. I do not talk about my patients upon the street. There was an examination of the plaintiff the day before or a few days before the operation. Dr. Kingsley, myself and the doctor whose name I have forgotten, were present at that examination; and Dr. Kingsley made the active examination. Their diagnosis at that second examination coincided with that of the first examination. They said she had female trouble and appendicitis; and all agreed it was necessary to operate at once. Dr. Kingsley was the principal surgeon on both occasions. Upon the first examination, Dr. Kingsley said the plaintiff's condition was bad and an operation was necessary; and he said the same thing upon the second examination. I am not sure,

but I think Miss Hill stopped at the Bexar Hotel when she first went to San Antonio with me to be examined. I called at Dr. Kingsley's office in about an hour or a little longer after the plaintiff reached San Antonio. I told him I had a patient I wanted him to examine for me, and he said he would, and he did. There was nothing said about any fees. When the operation took place I took an actual part in it. I assisted in holding the womb open while Dr. Kingsley removed the organs. As to what my fee is to be in this case is a personal matter. I never did diagnose a broken hip in this case. The plaintiff was operated upon for appendicitis and ovarian trouble, and the doctors who were actually engaged in the operation were Dr. B. F. Kingsley, myself, Dr. Kemp and Dr. Taylor. There were two nurses present at the operation, but I cannot recall their names. I do not know how many operations that amounted to what are known as heroic operations I have been present at. I have seen several operations like, or approximately like, the operation on plaintiff. The operation performed upon plaintiff could come as the result of injury or disease. The operation performed on plaintiff could have been the result of other causes besides the result of such an injury as she complained of in her suit against the Texas & Pacific Railway Company. Such conditions as I found do exist independent of injuries sustained in a railway accident, but I do not know how often it does exist in such cases. I have never read of a case of such condition as existed when the plaintiff was operated upon that was not the result of trauma or injuries inflicted in a railway accident. I know it is a fact that the very condition that existed or was found to exist when the operation was begun is com-

mon. The operation inquired about was successful. I have given the names of all the doctors who were present at the operation upon plaintiff. I do, in fact, know the names of the doctors who were present. No one is present besides the notary while I am answering these questions. He has asked me each question separately and wrote my answers as I gave them to him. I did not see the interrogatories, direct and cross, previous to giving my answers which are now written down, and no one showed them to me. They have not been read over to me by anyone. I have not discussed with anyone what my answers would be to the direct and cross interrogatories which have been read to me by the notary who took my answers. I was at my office in Pearsall, Texas, when I answered the interrogatories. I am to get nothing at all as a result of the suit against the Texas & Pacific Railway Company. My fees as a physician are \$300, and I have already been paid. It is not a fact that I treated the plaintiff and claimed that she had a broken leg or thigh. I did not state that I had discovered that plaintiff's hip bone was out of place prior to the operation made on her in San Antonio. I did not say that the plaintiff's hip bone was either broken or out of place, and that the doctors of defendant had never discovered it, which I could not understand, and also stated that I was going to have the best physicians in San Antonio examine the plaintiff, which would prove that her hip was broken or dislocated, and that it was incurable. The plaintiff was taken to San Antonio about June 14, 1912, and I accompanied her to have her examined by Dr. Kingsley; but he diagnosed the case the same as I did. It is true that when Miss Hill, the plaintiff, returned to Pearsall the latter part of



March she was looking exceedingly well and I so stated; but it is not true that when I took the plaintiff to Dr. Kingsley for examination he disagreed with my diagnosis entirely and claimed that an operation for another trouble was necessary. The occasion or necessity for the operation on plaintiff was to save her life. I did advise the operation upon plaintiff. It is not a fact that I claimed she only had a broken or dislocated thigh. It is not a fact that I did not know anything about any other trouble or complaint that she had, or the nature of the trouble which Dr. Kingsley advised existed, to-wit: the misplaced uterus, with probable adhesions in the pelvic cavity. It is true that the operation performed by Dr. Kingsley could have been caused from other causes besides the railway accident. I do not know whether there is a sharp dispute now between the doctors in respect to making such operation and the quick use of the surgeon's knife. I do not know it to be a fact that many doctors, so called surgeons, will operate more quickly than others on anybody who will get on the operating table, rather than to use other treatment and means of treatment to alleviate such complaints, and the resort to the surgeon's knife should be the last. I do not know whether it is a fact that after the accident the plaintiff returned to Pearsall, Frio County, where she lived, and walked from the depot to her home, five or six blocks, and did return to her work in the store and that she walked about Pearsall continually before the operation. The plaintiff told me she was hurt in the collision by falling against a seat and something falling on her. It is not a fact from what she told me that it would be impossible for such injury to have been caused to her in the manner



stated, such as to injure or misplace the uterus or to affect the appendix. Both ovaries and the appendix of the plaintiff were removed. The appendix is situated in the right side, behind the caecum or to the left of the ileum. The ovaries are situated in the broad ligament behind and below the Fallopian tube, one on each side of the uterus. The purpose of the appendix is unknown to me. There are many causes for injury to the appendix. The reason Dr. Kingsley and I refused to allow a surgeon to be selected by the Texas & Pacific Railway Company, one of the defendants, to be present at the operation was because we did not need him. Dr. Kingsley and I were not in conference at all times with the plaintiff's attorneys.

Whereupon the plaintiff, by her counsel, announced that she closed her evidence in chief.

#### DEFENDANT'S EVIDENCE IN CHIEF.

James Sullivan, having been duly sworn, testified as follows:

#### DIRECT EXAMINATION.

My name is James Sullivan; I live three miles from Hutto, Texas, in Williamson County. I was on the train of the Texas & Pacific going north which was wrecked on December 22, 1911. I was in the chair car. I do not know Miss Clara Hill, the plaintiff; but I heard her testify, and her face looks familiar. The train on which I was on ran into another passenger train on the side track at Kildare, and there was quite a shock. It was early in the

morning and I had my children on the seat with me. My little girl was on the seat next to the window and I was sitting by her when the shock came. She had awakened just before the shock came and was playing with a drummer across the aisle. He had been playing with her all along. When the train struck I had just dozed off to sleep. There was a sudden shock and I just raised up. I did not know what was wrong and looked about for my children. They were both on the seat. The little boy was across the aisle from me. He was asleep and when the shock came he raised up and begun to fight the air as I have indicated. My children were not thrown off their seats. There were some people hurt in the chair car. There was one fleshy lady going through the car claiming her back was hurt. We remained at the scene of the wreck about three or three and a half hours. I should judge that the wreck occurred about 5 or 5:30 in the morning. I could hardly state how severe the jar was, as I was lying back in my seat. There was a sudden stop. It did not throw me out of my seat at all. I could not say positively that I saw the plaintiff at that time. There were two ladies sitting somewhere back of me, and as the Misses Hill's faces look familiar to me, they may have been those ladies. I was on the right hand side. I went on from the wreck to Texarkana in the same chair car that I was in at the time of the wreck. I think the train got a new chair car at Texarkana. I never saw anything in the chair car of any weight that could hurt anyone, except glass. Quite a crowd went out to look at the wrecked engines. I did not notice any cripples out there, or anyone being helped around. The only ones I noticed were a few people that had glass cuts and scratches, and little plasters on their faces, and things of that kind.

### CROSS-EXAMINATION.

I gave in my name after the wreck. I do not know whether all the passengers' names were taken, but they took the names of all the passengers in the car I was in. I do not know how long the train was, but I think there were something like six or eight coaches. No one came to see me to find out what I knew until last week. I do not know who it was, but I guess it was one of Mr. Chew's men. Mr. Chew is the general claim agent. He asked us if we were on the train by letter and then sent a special agent to see us. The special agent was not Mr. Chew. The special agent has been to see me only once. He told me if I would come to court he would not subpoena me, and that he would pay my expenses. He did not subpoena me at all. No one came that was on the train except myself and wife. There was some little excitement after the collision. It made my youngest boy, sitting on an opposite seat, raise up in his seat. The first thing I thought of after the collision was to look around to see if my children were all right. I did not feel a sudden jolt, as I did not know what had happened. The jolt was more than the ordinary jolt incident to traveling on the Texas & Pacific railroad. I think I saw one mirror broken; but I could not say how many windows were broken, but a good many were broken. The two engines were put out of commission and were not any more good at all. I did not see any passengers thrown out of their seats by the collision. All I know about anyone be thrown was what my wife told me. She said she was thrown kind of in the aisle. I do not know whether or not my wife fell; and I do not know whether any passengers were thrown out

of their seats. There was a pretty sudden shock when the collision occurred; it was not very light.

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### DEFENDANT'S EVIDENCE.

Mrs. Sullivan, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

I am the wife of Mr. Sullivan who has just preceded me on the witness stand. I was on the train on the 22nd of December at the time of the wreck in question. I was riding in the chair car. The face of the plaintiff looks familiar and I think she was the lady sitting right in front of my husband at the time of the wreck. That was before the wreck, but after the wreck I cannot say where she was, as I did not notice her after the wreck. I reckon we stayed at the scene of the wreck two or three hours I did not look at a watch to see, but it seemed that long to me, as it always does when I have to stop and wait. I did not see anybody thrown out of their seat at the time of the collision. At the time of the wreck I had risen up and was going after some water and I stumbled and kind of tumbled down, but did not fall at all, but caught myself and took my seat. I did not see anyone fall in the aisles at all; and I did not see anyone trampled on. I went on to Texarkana in that car. I got off the car and went up to the engine and walked around and looked at the engines. I did not pay any attention to Miss Hill if I saw her after the collision; and I could not say whether I noticed her on the ground. I had my

breakfast with me and ate it in the car. The jar incident to the collision was just a stop. It was a jar, of course, but I could not say how much it was, as I did not realize what it was. I was in a seat just behind my husband. The children were not thrown out of their seats by the collision, but remained where they were. I would have fallen all the way down, but I caught and took my seat right there. I did not think about such a thing as a wreck occurring; but I had read about robbers holding up the train and that is what I thought had occurred.

#### CROSS EXAMINATION.

I did not think the concussion was so severe, as I was not unnerved over it at all. I do not know about other people being excited in the car, as I did not hear any excitement. I do not know of anybody being hurt, except in the way of scratches, but one old lady who claimed her back was hurt. I noticed some broken glass and window panes. I could not say how many there were, because I do not know. There was one mirror broken that I know of personally. I was not scared at all. I knew it was a sudden stop, but I did not think it was a wreck. I do not know how far it is from Texarkana to Kildare. I do not know how long we were in the car after we left the wreck, but it did not seem long to me. I do not know whether it was 2, 3, 4, 5, or 6 hours; but I do not suppose it was very long, as I did not pay much attention to the time. I never thought about the matter any more until I got the letter from Mr. Chew I have forgotten the name of the special agent that came out to see me; and I have not seen him since I have been here to Court. He came to our house where we live in the country. He might have stayed at my house

an hour or any hour and a half. I was busy and did not pay much attention to the length of his visit. He did not take down our testimony, but asked us what we knew. I was cleaning house and stayed in the room where he was just as short a time as I could.

#### RE-DIRECT EXAMINATION.

Mr. Chew wrote us and then sent a man. He had written two letters and we had answered them but neglected to mail them; and he did not know whether or not we would come to Court. My husband is a farmer. We do not own a farm, but rent. We were going to Mississippi to see my husband's father when the wreck in question occurred. We went as far as Texarkana in this car, but I do not know whether that car went on to St. Louis or not. The windows that broke was broken by dropping down,—at least the one by my little girl was broken in that way. I do not know whether or not I took the Cotton Belt at Texarkana. The next station at which we got off the train was at Little Rock, and from there we went to Memphis.

#### DEFENDANT'S EVIDENCE IN CHIEF.

H. G. Hansen, having been duly sworn, testified as follows:

#### DIRECT EXAMINATION.

My name is H. G. Hansen. I reside at Marshall, Texas. My occupation in December, 1911, was engineer on the Texas & Pacific Railroad, and my occupation is the same now. I was engineer on the train that was wrecked at Kildare on the morning of De-

ember 22nd, 1911. That was Train No. 104. It is supposed to be a through train to St. Louis. It comes through Pearsall and San Antonio and on to Longview, where the Texas & Pacific engine takes it. It takes about 8 cars; and those were the cars that my engine was pulling at the time of the wreck at Kildare. The train on which I was engineer ran into another train on the switch which was just in the clear. I expect I was going about 40 miles an hour when I discovered the peril; and I was running about 17 or 18 miles per hour when I struck the other engine. My speed was lessening very fast when I struck. As soon as I discovered the peril I put the engine in emergency and put on the sand lever, and holloed to the fireman to look out for himself. The engine was in fine condition. I did not jump, but remained on the engine. I was busy until we got pretty close to the switch trying to get the engine stopped; and by the time we reached the switch I saw the collision was not going to be great so did not jump. I remained in the cab until the engines struck and then got off. The collision knocked me down. The other engine was standing still. The collision occurred about 5:30 A. M. and we remained in Kildare about two or three hours. I started to take the train on, but a relief engine was sent out. It is my understanding that the chair car in my train went on; in fact, the whole train with the exception of the head car, which had a drawhead knocked out, went on. My engine was not really wrecked; but the truck was knocked from under the engine, and if it had not been for that I would have handled the engine back to the shops. The other engine was damaged worse than mine. I remained with my engine until that night. I did not see any cripples looking at the engines. I saw several people that looked like they

might have been knocked in the head; but I was so tickled that none were seriously hurt that I did not pay much attention to them. I do not know Miss Clara Hill, and I do not remember seeing her there. There was quite a crowd around the engines as long as the train remained there; but there were no invalids or cripples out there being helped around.

### CROSS-EXAMINATION.

The reason the trains ran together was because someone threw the switch. That is rather a serious matter. I think the switch is always locked and no one can open a switch except those that have keys. The switches are always kept locked and the keys are in the possession of the trainmen. I do not know who left the switch in question open; and it has never been ascertained as far as I know. I do not know whether anything has ever been done about the matter. I suppose that somebody who had possession of a key opened the switch and left it open or something of that kind. When I first discovered the open switch I was going something like 40 miles an hour; and I was going about 16 miles an hour when we struck the other train. I had a very heavy train. The other train was composed of about 6 cars, according to my recollection, and I had 8 cars. The collision put both engines out of commission for the time being; and the draft timbers and the cross bar that holds the timber was knocked down on the front coach so it could not be handled. The draft timbers of a coach are very heavy. I do not know whether the collision broke the draft timbers of the front car or not, but it knocked them down. I do not know how large the draft timbers were; some of them are made of steel now, but I do not know



whether the timbers of the car in question were steel or not. The timbers are something like 8x12 inches. It is my understanding that the remaining cars were not damaged, but all were taken on, and only my engine and the first car were put out of commission. I am not sure, but I think all of the other train was carried on by a new engine. Neither one of the engines in the wreck could be gotten to the shops without help. I never was blamed for the wreck, as I was running my train on schedule and I did all I could to prevent the wreck. The shock caused by the collision was a very severe shock.

#### RE-DIRECT EXAMINATION.

The cars in question are constructed with a vestibule between each one. I think that the further back the car is in the train the less would be the impact, as there is a spring in each drawhead, and each car has a bumper between the vestibules. In my opinion the heaviest shock would have been on the engine that struck the other engine; and the shock would be less and less the further back you go in the train, as the springs and bumpers would absorb the severity of the shock.

#### RE-CROSS EXAMINATION.

My fireman jumped, but I stayed with the train, and tried to reduce the damages to the minimum. I had 19 rail lengths to go when I discovered the peril before I struck, and I tried to do the best I could before we struck.

## RE-DIRECT EXAMINATION.

The rails were 30 feet long, and 19 times 30 is 570 feet.

## DEFENDANT'S EVIDENCE IN CHIEF.

Bert Cox, having been duly sworn, testified as follows:

## DIRECT EXAMINATION.

I live at Fort Worth. I am a passenger conductor on the Texas & Pacific Railroad. I was in charge of Passenger Train No. 104, that was wrecked at Kildare. Train No. 104 was going North or East. We took the International & Great Northern cars on at Longview. I did not know anything about the wreck until it happened. I was in the smoking room of the front Pullman, which would be the 5th car from the engine, when I felt the brakes go on and the train getting slower and slower, and I concluded that we had run on to the first section of No. 4. I got up to go out side, and just as I got up the shock came and I tripped and it threw me over a chair. It did not hurt me, and I picked my lantern up and went on out to see what the trouble was. I had just rose out of the chair when the impact came, and I fell towards the front end of the car. I went around and saw all the passengers as soon as I could get to them and as soon as I had sent out a brakeman to keep from having a rear end collision. I went through the chair car and took the statements of every passenger, with the assistance of Mr. Johnston. Mr. Johnston is present at Court. We took the statements of the passengers in the two smoking cars and the chair car.

We took down the name of Miss Clara Hill. The question was asked her if she was hurt and she replied No. She was sitting in her seat and did not appear to be hurt. Mr. Johnston was with me when we took her name. I did not say to Miss Hill at the time, "You look scared," and if Mr. Johnston said that to her I did not hear him. There was a large fleshy lady in the chair car who claimed she had her back hurt and we took her back to the Pullman. I do not remember her name. That was the only person we thought was seriously hurt. There were a number of passengers I thought needed a physician, though no one seemed to be seriously hurt, and no one complained of being seriously hurt. I sent in the names and addresses of every one of the passengers. There were a good many people that went out and looked at the engines; but I could not say whether the Plaintiff was out there or not, as I was too busy to distinguish her from the rest, and there was nothing about her to distinguish her from the rest. The chair car went on to Texarkana in the train just as it stood when it struck. In the chair car there were four windows broken. They were double glass windows, and one glass was broken out in four windows; and at the front end of the car a mirror was broken out. The window glasses were shattered and fell on the floor. The windows were down when the shock came, as it was cold weather. I do not remember but one little boy that was hurt by glass. He was not in the chair car and was scratched or cut. He was the worst injured one I found when I went through the train. I was in the first Pullman back of the chair car when the collision occurred.

## CROSS EXAMINATION.

The chair car was the fifth car from the engine and then came the sleepers. There were four sleepers. I was in the sixth car from the engine. If I remember right the old lady who was hurt was in the chair car. She claimed to be hurt in the back, and we took her back to the sleeper so she could lie down. I do not believe the claim agent came out to the wreck; but the Superintendent's clerk came out there. The draft iron of the mail car, which was the first car from the engine, was crushed down so it could not be coupled on to. The coupler was not broken. The iron timber was not broken, but was pulled down. The timbers are very securely fastened; and is supposed to be able to pull a great number of cars, I suppose. The next car was not damaged much, but went intact into terminal. It did not have any broken windows in it. The next or third car was a coach. There were no broken windows nor no one hurt in that. The next car was a coach; and no windows were broken in that. I found the broken windows in the chair car about the middle of the train. That is accounted for by the double windows and the way they are put in. No mirrors were broken in any of the other cars. The mirror that was broken was in the partition wall of the car. I do not remember how it was broken, but it seemed to have been broken by the water cooler flying into it. The water cooler sets in a receptacle made for it and has a brace on it, and it pulled that brace loose; and I think the water cooler was what broke the mirror. It is not hard for me to remember what each passenger told me as I put it on paper. I put on the paper just what Plaintiff told me and her name and address. I was supposed to get the names and addresses of all the passengers.

### RE-DIRECT EXAMINATION.

I took the names and addresses of all the passengers and their answers Yes or No as to whether they were hurt. I put on the paper what they told me; and if they said they were injured I put that down. Those are my instructions. I do not know what is done with the information.

### RE-CROSS EXAMINATION.

I would first ask the passengers for their name and address, and they would give it to me. Then I would say "are you hurt," and if they would say "Yes" I would put it down; and if they said "No" I would put that down. I cannot say whether or not the information I furnished is what the claim agent acts on when he gets hold of it. I do not know whether the claim agent, when he got a paper saying a passenger was not hurt, would hunt such passenger up or not.

### DEFENDANT'S EVIDENCE.

Miss Ethel Johnston, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

My name is Ethel Johnson; I live at Marshall, Texas. I was on the train which was wrecked at Kildare on December 22nd, 1911. I was going North, and was in the chair car. I experienced such a shock as one would feel if the brakes were turned on all of a sudden and the train was going right fast. I did not get hurt in the least. I was sitting about three

seats from the front of the car next to the window. I do not remember seeing the Plaintiff or her sister at the time. I have seen them since in the court room and on the street. As well as I remember I was dozing when the shock came. All the seats were thrown back as they always are that early in the morning; and when the shock came everyone jumped up. I did not see anyone thrown into the aisle, and no one was seriously hurt. I did not see anything flying around in the car. As soon as the shock occurred the glass fell all around between the windows and down next to the chairs and in places like that. I did not see a water cooler loose in the chair car. About half an hour after the collision I went out and looked at the locomotives. When I got off the car there was an embankment there, a low place, and we had to be helped down, as we could not step from the car right down to the ground, and there was no stool to step on. I do not remember how many people went up to look at the engines, but there was quite a good many people. I do not remember the conductor coming through the car, but everyone was going from one end of the car to the other, and I did not know one person from another, except some of my acquaintances. My father came through the car and took down the names of everybody that was hurt. My father is Western Union Supply clerk for the Texas & Pacific railroad. His name is Albert Sidney Johnston. I expect he is a nephew of the great Albert Sidney Johnston. I do not remember the Misses Hill being out of the chair car looking at the engines at all; and I did not see anyone out there being assisted as if they were cripples. No one was seriously hurt in the chair car that I know of; a few were scratched a little bit. I was three seats from the end of the car next to the engine

and on the right hand side of the car. I saw a big fat lady who said her back was hurt. She seemed to be very much frightened and seemed to be an excitable person. She said "We are going to drown," and then said "We are going to burn up." The people in the car quieted her and told her there was no water in 20 miles of there and that she would not be burned. That seemed to quiet her; I did not know the lady. The car was full as it was during the Christmas rush. My father could not secure a seat in the car with us at all, as every seat was occupied. None of the passengers were thrown over the seats in the collision that I know of, and no one was thrown out in the aisle, but some were thrown a little forward. When the air is put on there is always a sudden stop. When the collision occurred it awakened me and scared me some, as I did not know what it was at first; I went forward if I moved in any way. The shock was so sudden I think I jumped more than anything else, because when I came to my senses I was on my feet. There was no water cooler where I was; nor did I see anything in the air. The window glasses were broken out just like any other windows would be from a jar; they just broke and fell down. I went on in the same chair car as far as Texarkana, where we were to take a sleeper. We went out of Texarkana on the Iron Mountain; and I do not know what became of the chair car we were in at the time of the collision. At Texarkana we got out of the chair car and took a sleeper. My father and sister were with me. My sister's name is Sidney Johnston. I do not know how many cars were ahead of the chair car we were in at the time of the wreck; and I do not know what became of the cars ahead of the chaircar; nor do I remember whether another engine came and took them on from Kildare.



## CROSS EXAMINATION.

My father is Western Union Supply Clerk on the Texas & Pacific. I do not know whether the Texas & Pacific, the I. & G. N. and the Missouri Pacific are about all the same. I had no companions except my father and sister, with me when I left Marshall; and there were no acquaintances of mine on the train that I knew of. I was riding on a pass, as was my sister. I have not discussed this case except when I discussed it the night after the collision. I knew I would have to come to Court the middle of last week for the first time. I was not notified to be at court when the case was called before. I was reclining and dozing about three seats from the front end of the chair car when the collision occurred, and my seat was thrown back. The way the seats are arranged in that car they can be thrown backwards or forward. My back was towards most of the passengers. The collision did not startle me any more than any other jar would; it awakened me; but I did not know what it was. I had never been in a wreck, and it seemed to me about like an application of the brakes when the train is going very fast. I did not realize that the windows were broken at the time. I heard the glass falling when the impact came. I think one or two looking glasses were broken and several double windows were broken. I do not know whether you would call it a very severe collision or not. I do not know who was hurt. I think the fleshy lady who was hurt was more frightened than anything else. I do not know whether or not she was seriously hurt. I asked if anyone was hurt seriously and from what I could hear no one was seriously hurt. I asked different passengers standing around in the train if anyone was seriously hurt. The acci-



dent might have hurt some one. The question I asked, that is, if anyone had been hurt, was a question I suppose anybody would have asked. I guess there was occasion for thinking someone had been hurt after I was told what had happened. I did not have time to think about it when I first woke up.

#### RE-DIRECT EXAMINATION.

I did not see anyone down in the aisle at all when I came to myself after the concussion; and I do not see how anyone could have gotten into the aisle, as most of the chairs were in an inclining position. If anyone had fallen in the aisle and three or four persons had fallen on the person in the aisle, I think I would have seen it. I saw nothing of the kind there. I was looking forward at the time, and when I got up I looked around the car, and I saw nothing like that. I do not know just how long it was after the collision before I looked around, but it was just like anybody else would look around, I suppose, in a second or two. I am going to school in Marshall, and my sister is in school in San Antonio.

#### RE-CROSS EXAMINATION.

My father did not take the names of the passengers who were not hurt that I know of, but he just took the names of those that were hurt. I do not remember whether the conductor was with him or not; but as far as I remember he came through by himself.

#### RE-DIRECT EXAMINATION.

I do not know whether my father took my name at all or not. I know the conductor, Mr. Cox; but I

do not remember his coming through the car with my father. I do not know Dr. Long; and I do not remember any doctor coming through the chair car, inquiring if anyone was hurt. The wreck occurred before day, about 5:30 A. M.

### RE-CROSS EXAMINATION.

If any doctor was on the train I did not know it.

### DEFENDANT'S EVIDENCE. IN CHIEF.

Miss Sidney Johnston, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

My name is Sidney Johnston. My father is Albert Sidney Johnston. I live in Marshall, Texas, which is my home. I am going to school at the Academy of the Incarnate Word, San Antonio, Texas. I was on the train which was wrecked at Kildare on December 22, 1911. My father and sister were with me. I was in the chair car. I was sitting in the seat when the wreck occurred. When the air was applied I was pushed forward; but I was not hurt in the least. I do not remember anybody getting hurt, and I do not remember anyone being thrown from the seats or over the seats, and no one was thrown in the aisle that I know of. I was sitting in the third seat forward on the right aisle. All the seats in the car were occupied. The shock was just like applying the brakes when the train was going fast. I have ridden on trains a good deal. I do not remember seeing Miss Hill, the Plaintiff, on the train. I went out

and looked at the engines in about half an hour after the accident. About all of the passengers went out and looked at the engines. There were none of them out there that was crippled or decrepit that I know of. I do not remember seeing anybody being helped around. The bottom step of the car was pretty high from the ground, and we could not get out of the car without help; somebody had to take my hand and let me jump, as there was no stool to step on. Mr. Cox, the conductor, and the porter and my father came through the car and the porter took our names. I think my father was in the smoker when the collision occurred. He was not with my sister and I because he had no place to sit. None of the passengers were seriously hurt, but a few that I remember were scratched with the broken glass. I noticed the old fat lady. She said her back was hurt and that she was going through a bridge and that she was going to burn up. She was very much frightened. I did not know her. We had breakfast on the diner after we left Atlanta. I think it was in Texarkana that we stopped. We went on to Texarkana from the wreck in the same chair car. The only difference between the chair car before the wreck and after the wreck was that some of the glasses were broken and some of the seats were started forward. I did not see anything of a water cooler loose anywhere; nor do I remember anything flying around in the car. The glass was all that I know about.

#### CROSS EXAMINATION.

I was sitting by my sister when the collision occurred. I was awake at the time the shock came. I do not think the shock had a tendency to throw me forward very violently when it came. I would not

say what effect it had on the other passengers, but I do not think it had a bad effect on them. There was no one badly hurt in our car. I know that because I asked, and there did not seem to be anybody badly hurt. The old lady was more frightened than anything; but I do not think she was hurt. I would not be willing to take the lady's word for it.

DEFENDANT'S EVIDENCE.  
IN CHIEF.

Martin Warren, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is Martin Warren; my residence, Douglasville, Cass County, Texas. Douglassville is about 12 miles or more from Queen City. I was on the train which was wrecked at Kildare on December 22nd, 1911. I was in the chair car. I was seated three seats from the front of the car on the left side. When the wreck occurred it did not have any effect on me except to throw me forward a little. It did not hurt me at all. I did not see anyone around me that got hurt. I did not do anything but stand up and look around. I could see all over the car. I did not see anyone in the aisle. No one was down in the aisle that I know of. I did not see anyone down in the aisle and three or four people fall on them. I do not know Miss Clara Hill personally, but I know her by sight. I did not see her at the wreck. I went up and inspected the wrecked engines and then went up to Kildare and walked around. We were going on about bringing damages suits, but we were not hurt. I saw no one there that was seriously hurt in

the chair car. The old lady who claimed to be hurt was frightened. She said her back was hurt. I do not think she was thrown out of her seat. She was right behind me, but I do not think she was thrown in the aisle. I did not see her until I got up. I got up and took in the whole car with my vision, and saw nothing of anyone down in the aisle. I did not see anything of a water cooler loose in the chair car. I do not know where the water cooler was. There was one mirror broken, I think, and maybe more. The broken mirror was on the side of the car a short distance from where I was. I got off that car in Atlanta. It is 16 miles, I think, from Kildare to Atlanta. The chair car was not put out of commission. I did not go from Atlanta to Queen City on the next train, but I went home to Douglasville from Atlanta. My father is William Richard Warren. I did not get any breakfast the morning in question until I got to Atlanta.

#### CROSS EXAMINATION.

None of my relatives are connected with the railroad service in the least. I traveled together with the Misses Johnston from Marshall to Atlanta. I had my back to most of the passengers. The concussion in question was not an unusual concussion. It was not anything very shocking to me. I have experienced worse things than that. I meet up with those things in the ordinary stop on the Texas & Pacific. I do not think the shock was any more than usual. I was never on a train when the brakes were applied and the windows knocked out. But this shock did not seem to be more than the ordinary to me.

DEFENDANT'S EVIDENCE.  
IN CHIEF.

Ed Silvers, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is Ed Silvers; and I live at Quincey, Illinois. I was on the North bound I. & G. N. train on December, 1911. That was the train which was wrecked at Kildare. It ran into a train going south on a switch. Our train was headed North and took the switch. I was in the smoking car, which was the next car in the rear of the baggage car and the second car in front of the chair car. I was leaning back a little and the jar was such as to bring me forward as I have indicated. It did not hurt me, and I went on in the same car to Texarkana. I was in the chair car earlier in the night and then went into this smoker. I was not in the chair car after the wreck. I did not get breakfast at Kildare. Someone came through the train and took my name and address, but I do not know who he was. He also asked me if I was hurt, and I told him No.

CROSS EXAMINATION.

The reason I came to testify was because I had a letter signed by Mr. Chew asking me what I knew about the case. I got that letter sometime the latter part of January last. I wrote Mr. Chew and told him the facts as I knew them. I have never met and talked with the Claim Agent since. I am a salesman for a water and supply company. I only told Mr. Chew the facts about the case as I knew them, and

then he sent for me to come from Quincey, Illinois, here to testify and I agreed to come. He agreed to pay me for my time lost and my expenses. I am charging my actual time, which is \$100.00 per month and expenses. My salary will be stopped while I am gone. I volunteered to come here and tell the jury about this collision when there was no consideration in it for me. I volunteered to come all that distance to tell the jury that I was only thrown forward a little bit and anything else it was desired to ask me. There were a good many people in the train as it was during the holidays. I do not know whether they were Texas people traveling back to see their kinfolks. I saw a great many of them getting off in Texas. The shock was a sharp one. It did not break anything in the car I was in except one man's tooth. The man had his face against a seat. He was sitting one seat back of and opposite me. I could not say whether he was just holding his tooth there waiting for the collision. I have seen the same kind of a shock happen on a street car, but not on a train. A train going 18 miles an hour striking another train standing still will produce some shock, but just how much I could not tell. I should think it would depend entirely on how the passenger was sitting when the shock came.

DEFENDANT'S EVIDENCE.  
IN CHIEF.

A. S. Johnston, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is A. S. Johnston; my residence Mar-

shall, Texas. I occupied in December, 1911, the position of Supply Clerk for the Western Union and the Texas & Pacific Railroad. I mean by that I have charge of the stationery department, and furnish all the dispatchers and operators of the Texas & Pacific Railroad and the Western Union people with their supplies. I have been in their employ 42 years. I was a line repairer for a while, and now have charge of a small amount of line. I was on my way from Marshall to Arkansas to visit my oldest daughter on December 22, 1911, and was in Missouri Pacific chair car on Train No. 104, which left Marshall about 4:40 A. M. I was in the wreck at Kildare. I am on the road a great deal, but of late years I am not on the road as much as I used to be. I stay in the supply room most of the time now. When the collision occurred I was in the North end of the chair car in what is called the gentleman's smoker. I was lying on a seat which ran from one end of the compartment to the other in the position I have indicated. When the concussion came it slid me right off. I felt the emergency first, and about that time we struck and I slid off on the floor. The shock was not very severe, but I knew something had happened. It did not hurt me a particle. I was awake at the time. I do not remember Miss Clara Hill. It was misty raining and in December when the accident occurred and was still dark. After the excitement was all over Mr. Cox, the conductor, came to me and asked me to go to the mail car and get a long piece of paper and go through the train and take the name of every passenger and ask them the question "Are you hurt?" and those that had scratches or needed a doctor to report them. Mr. Cox had his porter holding a lantern, but soon after I started Mr. Cox came along and held the lantern and I put down the names. If a passenger was



scratched or cut I would put that down. Mr. Cox kept that report, and sent it to his Superintendent I suppose, with his trip report. We have accident reports of every kind; and any accidents that happen are always taken down. I do not know whether that report is here or not; I have not seen it if it is. Just as soon as the collision occurred I jumped up, and as I did so I heard my daughter Sidney say "Where's daddy." She was about three seats from where I was and I said "Here I am," and when I got to her my other daughter and she were standing up. There was an old lady about in the middle of the car, 6 or 7 seats from the East end of the car, who was holloaing, "We are going to burn up." I said to her "No, madam, we are not going to burn up;" and she said "We are going to burn or drown" and I told her we would not burn nor drown as the river was not in forty miles of that place. She seemed to be very nervous. We finally got her quieted and I went on into the other cars. I went through all the cars, except the sleepers, before I began taking down the passengers names, to see if anyone was hurt. I did not find any passenger in the chair car that was seriously hurt. Several had abrasions on their faces or hands, and there were several glasses broken in the car. There was one looking glass broken in the toilet room of the chair car. That glass was broken by a big Dutchman's head. He was in the position I have indicated washing and he broke the glass with his head, and it made a little knot on his head about as big as a quarter. It did not hurt him much, as he said "You can't kill a Dutchman with a little lick like that." There was a water cooler in that compartment about that wide and that tall (indicating) and when the collision came it fell on my legs and dropped right down on the floor, but did not go out of the com-

partment. It was sitting on a little shelf and was not fastened in in any way. When I went into the chair car proper it looked to me like everybody was standing on their feet, and this old lady was holloaing, and of course, there was considerable confusion. I did not see anyone down in the aisle and I did not see anyone fall in the aisle and three or four people fall on them. After Mr. Cox went up to the office at Kildare and reported the accident a relief train was sent out from Marshall to take No. 3's train; and another train was sent out from Texarkana to take our train. Our entire train was carried on to Texarkana, with the exception of the mail car. The draft timbers of the mail car were down and a coupling could not be made to it and that car had to be cut out. The accident occurred about 5:30 and I think we left Kildare about 9 or 9:15, making our delay at Kildare about four hours. It is about 16 miles from Kildare to Atlanta, and 22 miles from Atlanta to Texarkana. That is the mileage under the new measurements. I certainly did ask Miss Clara Hill, while I was writing down her name, if she was hurt. I asked everybody except those in the Pullmans, as Mr. Cox took those, if they were hurt. Miss Hill's reply to my question was that she was not hurt. I put down on the list the answers as they were given to me. I said, "Beg pardon, but were you injured, what is your name and address, state where you live," and whatever their answer is you will find on the list. Of course, I did not know Miss Clara Hill personally, but her answer will be found on the list as she gave it.

#### CROSS EXAMINATION.

In the chair car were small panels of glass 6 or 8

inches long between each double window. I noticed the glass next to where my daughter Sidney was sitting broken. I noticed one or two of those mirrors broken in the chair car; and I think my daughter got one of the pieces and carried it along with her. Three or four of the big window glasses were also broken. I can recall that the first window in the extreme Eastern end of the car on the North side was broken and one or two others. I noticed the broken glasses after the accident. I got a stick with which the ventilators are opened and knocked out all the broken window glasses, as I thought they might fall. I knocked out two that I know of. When the shock came I was in a reclining position with my shoulder like this, (indicating) and my head was like this and the water cooler was there (indicating) and I slid right down here (indicating) and the water cooler hit me about here (indicating). The water cooler was not held in place and protected by running up into a chimney or flue. The coolers we have now on the Texas & Pacific have a band that goes around them and screws in the wall, but this cooler had none. I could not tell how serious the wreck was when I felt the shock; but I knew there was something wrong when I heard the emergency application. I could not tell whether it was a head-on collision or not. Being an employe of the road I naturally felt a desire to know what the trouble was when I felt the shock. When I rushed out of the little smoking room my daughter Sidney was right at the door and said "Where is Papa." She was alarmed, and she doesn't like for her father to get three feet away from her anyway. It is true that she was alarmed for me as well as for herself, as any daughter would be. The conductor was with me a part of the time that I was taking the names of the passengers in the chair car.

He had just gotten started good when he told me to take charge while he went out to make a report; and I think he had taken a few names before I came in. There were lots of passengers on the train; and some seats had as high as three or four in them. That was a through train and only made three stops between Longview Junction and Texarkana. I suppose a good many of the passengers were people leaving Texas to go to see their folks; but from the list we took I judge the passengers were from all the States. A good many of them were Texans. I could not say whether a majority of the passengers were Texans or not; but it seemed they were all going back to see their wives' people.

#### RE-DIRECT EXAMINATION.

I do not remember, when I approached Miss Clara Hill and asked her if she was hurt, that she said "No" and I replied, "You are scared," or words to that effect. I might have said it or I might not. I do not remember saying that to any lady. I would go up to a passenger and say "Madam, are you injured in any way; we want to know it; we want to treat you right," and I would put down whatever they said. I could not remember what the plaintiff said as I did not know her, but whatever she said is on the paper and is a correct answer. By referring to the paper handed me I see her answer is "No." Both she and her sister answered "No." The paper handed me is in my writing and that is the plaintiff's correct answer.

The defendants refused to allow the paper to go before the jury when request was made by plaintiff. It was because there were persons on the train whose names were given that might be used as a basis of

suit. We did not regard Carter and Lewis belonging to that class and offered to show the list to them.

### RE-CROSS-EXAMINATION.

The names on the paper in my handwriting and in lead pencil, were the names of the passengers in the two first coaches and the chair car. The report is supposed to cover three cars. I could not tell from the paper whether it covered three cars, because the passengers were scattered all around and some were out in the woods, and I could not tell which car they were riding in at all. The list handed me represents all the names that I took. A part of the list handed me is in my handwriting and a part in Mr. Cox's handwriting. I was present with Mr. Cox and his negro porter when Miss Hill answered the questions asked her. Mr. Cox or I asked the questions just as we would come to them. Three of us were present a part of the time the passengers were being interrogated. I do not think I had any conversation with any passenger along the line detailed by counsel, that is, that I told a passenger she was not hurt but scared. I would have no right to accuse a passenger of being frightened as I was no doctor. I do not remember whether Miss Clara Hill stated she was frightened or not. I do not know whether there was a conversation with a young lady where the young lady was told "You are not hurt, you are frightened," and she replied, "Well, maybe so." I won't swear that Miss Hill did not say that. We were asked all kinds of questions as we went through the cars, such as how long we were going to be detained there, and when we were going to get away, etc. The name of a little boy who had a cut on his face was given to me, and it will be found on the list. I marked on the list whether

it was a child, boy or girl. I think possibly I might not have gotten the names of all the children, because as it began to get daylight they were scattered around. I do not think there was any passengers hurt in the chair car seriously. I did not get the old lady's name as she was taken back to the sleeper.

#### RE-DIRECT EXAMINATION.

If a passenger told me that he or she did not know whether they were hurt, I would put that down. I would ask the question this way, "Are you hurt in any manner or form?" and if they said, "No" I put that down, and if they said "Yes," I put that down; and if they claimed their neck was wrenched, or nose was mashed I put that down; and if a passenger told me he did not know whether or not he was hurt, I would put down, "Cannot tell."

#### RE-CROSS-EXAMINATION.

I do not remember a young lady, the plaintiff, when asked the question "Are you hurt," saying "I do not know;" and somebody replied "You are just frightened; you are not hurt." But I addressed her in this manner, "Miss, are you hurt, or injured in any way," and if she said "No" it was put down in that way. If the plaintiff had told me she was frightened or hurt by a nervous shock I would surely have put it down, because there was no object not to put it down.

## DEFENDANT'S EVIDENCE IN CHIEF.

DR. R. L. LONG, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

My name is R. L. Long; my residence is Atlanta, Texas; and I am a physician and surgeon. I was not on the train which was wrecked at Kildare on December 22nd, 1911. I was at the wreck after it happened. I got to the wreck about 8 o'clock, coming from Atlanta. I was asked to go to the wreck by the company. I was not a local surgeon of the Railroad Company at the time; but answered the call for doctors to come down by a wire from Kildare, I think. The Railroad Company carried the doctors to the wreck in a caboose. Three doctors went down. The first thing I did when I got off the caboose was to get on the train going West, No. 3, I think. About the first man I met when I got on the train was Mr. P—— who was a passenger on the train going East which ran into the other train. He had gotten on the train and seen several passengers that were hurt and pointed out to me several people around there and told me I might see them, and I saw several passengers on the train and took their names and addresses. That was on the train going West, I think, and I went through every coach except the mail and baggage cars. I then went to the train going East and stayed on it for quite a little bit. I got on the train going East about 30 minutes before it started to Atlanta. Two doctors had already been on that train. And when I got on that train there was a claim agent or conductor or someone who had seen most of the injured, but I called on all of them. I



went through the smoker and chair car; but I do not know whether I went into the sleepers or not, but think I did. I do not remember Miss Clara Hill. I do not think I gave but one person any medicine, and I think that was on the train going West; but there were eight or ten passengers that had little bruised places or cut places on them, and I treated about 10 in all on both trains, five or six of whom were on the train going East. I treated them for cuts on their hands or faces and some of them were bruised. I do not think I treated anyone but what had signs of their hurts. I remember one little boy that a lady asked me about, whom, she stated, had been sick during the night; but I did not give him any medicine. I noticed quite a good deal of glass broken in the chair car. I did not notice anything else torn up in the chair car. I did not know anything about how the wreck occurred as I was in Atlanta at the time. I did not hear anything about anybody having a dislocated hip; nor did I know of anybody having a broken hip or broken back or trouble with their back. No one in the chair car made such complaint to me. I went through the chair car, but I did not stop at every person, as some employe of the railroad was with me and he had taken all of their names, and knew where each person was that claimed to be hurt. The employes of the railroad had taken the passengers names before I arrived there. I have seen Miss Clara Hill in the court room. She may have been on the train at the time of the wreck, but I do not remember seeing her.

#### CROSS-EXAMINATION.

Two doctors, went to the wreck besides myself. They were Dr. W. A. Starkey and Dr. W. D. Wheelis.



Dr. Starkey was the Railroad Company doctor. I went down as a matter of emergency. This was the only wreck I was ever called on by the Texas & Pacific to go to. Unless there is a wreck or something serious I am not called on by the railroad to go out in that peremptory way. My list shows that I treated 10 or 11 people at the wreck. I suppose the other doctors were busy also; but they did not have as many patients as I did.

### RE-DIRECT EXAMINATION.

I think all three of the doctors that went down to the wreck were in the chair car of the train going East or North before we arrived at Atlanta. I do not think any of the other doctors were with me in the chair car when I made my inquiries; but Dr. Starkey, if I am not mistaken, was with the fireman that was hurt and Dr. Wheelis was with an old lady, at the time. I do not remember seeing them in this chair car until we were returning to Atlanta, and they were not treating any patients at that time. I do not know who sent the telegram asking for aid; but it was delivered to us by the operator at Atlanta. I would have gone, no matter who sent it. I was paid for my attendance. I am not in the employe of the Texas & Pacific Railway Company. The message to us must have been sent about seven o'clock, as I know I was at breakfast when it came, and I went to the train with it in my hand. It must have been about 7 o'clock because the drug store was not open and we had to send for a man to get us some drugs before we left.

## DEFENDANT'S EVIDENCE.

DR. J. C. STRONG, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

My name is J. C. Strong, and my residence is Queen City, Texas. I have been living there 13 years. I am a graduate of the Georgia Medical College at Atlanta, Georgia. I know Miss Clara Hill; and I know all of her family living at Queen City. I have known those of her family living at Queen City ever since they moved there. I am their family physician. The first time I was called in her family was to see Miss Clara Hill, the plaintiff. I remember the time of the alleged wreck on the Texas & Pacific when Miss Hill is alleged to have been injured. I was called upon to see Miss Hill on the 24th of December, a couple of days after the wreck; but I could not say positively whether it was in the morning or afternoon. Her father came for me, and said that the plaintiff was not doing well. I do not remember exactly what he said, but in substance that he wanted me to go down and see the plaintiff. I do not know that I was told what her complaint was. I knew the plaintiff had been in the wreck, and I suspected that she was feeling badly from that, and asked her if she was injured, and she said No, that she was pretty badly shaken up; and I gave her a little medicine and did not see her any more, if I remember correctly, until that night after I came home, when I was called again to see her. The plaintiff was more or less nervous when I made my first visit, and on the next visit I found her nervous, and I was told about a little ulcer on her thigh; and I do not remember

whether I suggested that it be looked after or some of the family, but anyway I dressed the thigh when I went back that evening or night about 9 or 10 o'clock. That night, if I remember correctly, the plaintiff was sick at her stomach, but I do not remember whether she had a headache at that time. I attributed her sick stomach to the nervousness. The ulcer was an open ulcer. It was not very deep but was discharging more or less pus and I cleaned that out thoroughly, and she did better until the 31st of December, and I did not see her from the 31st until the 7th of January; and from the 7th until the 15th I saw her every day and sometimes twice a day. During that time she vomited considerably. If the plaintiff vomited before the night I was first called back I do not remember anything about it; and she did not tell me she had that I remember. I generally ask all such questions, but I do not remember now whether she had had any vomiting before or not. The plaintiff complained of her hip later on, but not when I first treated her. She was up a part of the time from the first of January; and I recall a time or two she was up. She was up from the first of January until the 7th, then she was very nervous again and could not retain any nourishment, and her family were very nervous and I suggested that they take her to a hospital. I discovered that her family were very nervous from the fact that they came for me and sent for me and would be very excited and would meet me half way, and want me to come on; and I called their attention to their actions, and held down all the excitement I could. I did not give her very much medicine, but tried to keep her as quiet as possible. Dr. Roach was called in on the evening of the 24th during my absence, and when I came I talked the matter over with him, and we thought her trouble

was caused from the septic trouble from this ulcer; but the nervousness continued after the ulcer was healed, and it was practically well when she went to Texarkana. My diagnosis with reference to her nervousness was a neurasthenic condition; and I concluded that was her trouble. I think the plaintiff complained to me of soreness in her back before she went to Texarkana, and I examined the back and could not find any acute trouble at any given spot; but it was just soreness and I prescribed a liniment for her two or three times possibly. I examined the plaintiff's spine, but I found no trouble with it. She had complained of soreness and I made an examination to see if there was any particular spot or anything to cause the trouble. She made no complaint of any soreness at any other point, but her stomach was the proposition that was giving me the most trouble. Neurasthenia would cause the trouble I found with her stomach. I finally concluded that the cause of her trouble was her nervous system, and her stomach and digestion. As well as I remember she was constipated when I first saw her and some days she would do better and possibly the next day she would not do so well and would be unable to retain her nourishment. She was taken to the hospital on the 15th of January. I treated the plaintiff from December 24th until December 31st, and then did not see her until January 7th; and from January 7th until January 15th I saw her every day; and on the 15th I carried her to Dr. Dale's sanitarium. I made a close study of her case and troubles and did the best I could to relieve her of those nervous conditions. I have found that if a patient suffering in that way can be taken to a hospital away from the influences of their family they will do better, as sympathy is not what one needs in such a case of nervous troubles.

I carried the plaintiff to Texarkana because that was the most convenient point to take her, and I knew that Dr. Dale had a good sanitarium and that she would be well cared for, and I thought it was the best thing to do for her. Dr. Dale is a very successful surgeon and practitioner, and I usually carry my patients to him for operations. I know that Dr. Dale is regarded very high by the profession. Dr. Dale has written several articles in his profession, but I know of no books which he has written. I gave him the result of my diagnosis, and he took charge of her, and I was up to see her only once after that before she was taken home, at which time she was up, in the parlor, and doing nicely I thought. The plaintiff returned to Queen City from Texarkana, but I could not say just how long she remained in Queen City. She was very nervous after she returned from Texarkana for a few days and I treated her something like a week, I think. The plaintiff did not give me any reasons for leaving Texarkana, as I did not see her just prior to her leaving there. I talked to her people about her remaining in Texarkana, and I wanted her to stay as she was getting along so well; but she was so anxious to return home that I thought her worrying over it would cause her as much trouble as any good she might accomplish by staying. After she returned to Queen City she did not want to go back to Texarkana. The reason she wanted to leave Texarkana was because she wanted to come back home and spend a while. I mean by "home" her home in Pearsall. Her father's home was in Queen City but I understood that the plaintiff's home was in Pearsall, and there is where she wanted to go. I told the plaintiff I thought she was able to stand the trip, and I did not think she would be any worse off by coming, as she was

anxious to come. I do not remember whether or not I told plaintiff to come to Pearsall as there was malaria at Queen City; and I will not say I did not tell her that; but my real reason in advising her to come was as I have stated. The plaintiff was able to come to Pearsall at the time alone. The plaintiff was able to walk some, but how much I could not say. I saw her up town some. At that time I could not see anything in her walk that indicated any trouble. Upon her return from Texarkana she told me that she could not wear her corset; that it gave her pain. That was just a subjective symptom. What she said to me about it was all, and she also complained of pain in her left side. She said the pain was in her hip and I examined her and found the pain was in the lower part of the abdomen. I did not find anything wrong with her hip that I remember of. I had a talk with Mrs. Hill relative to examining her daughter, the plaintiff, for female troubles. I heard Mrs. Hill's testimony relative to that matter and I dislike to make the statement, but she has forgotten the conversation. One afternoon between the 25th and 30th of December, Mrs. Hill told me that the plaintiff had had some female trouble, and as soon as she, the plaintiff, could get straightened out, that she, Mrs. Hill, wanted me to look after the plaintiff. I told Mrs. Hill "Very well," but I never got to examine her but I called Dr. Dale's attention to the matter when I took plaintiff to Texarkana. I did not make an examination because I did not think plaintiff had recovered sufficiently to make an examination of that kind, and there was nothing there to warrant any immediate examination. That was my opinion when I treated her. I looked after the plaintiff very closely when I was not very busy, and I would go in to see her probably two or three times a day. The

plaintiff did not mention any medicines she had taken or any treatment she had received, but Mrs. Hill told me the plaintiff had never had a doctor to treat her. She also said the plaintiff had taken some patent medicine, but she never said what kind it was and I never asked her.

### CROSS-EXAMINATION.

The plaintiff did not tell me how much patent medicine she took. I am a local surgeon for the Texas & Pacific Railway Company. I put in an application for such employment in 1911, and got the appointment the first part of 1912. I do not remember just when I got the appointment, but I think it was some time in February. When I applied for it I was told they did not act on those matters until the first of the year. I saw Mr. Chew a time or two when he came to Queen City. He came there to see Miss Clara Hill. I think he was there twice. I am not sure that he saw me each time; but I am sure he saw me once. I do not remember whether I got the appointment in January or February, but I got it while the plaintiff was under my care. The plaintiff was under my care until the 5th of February. I never prescribed for her after the 5th of January, although she was my patient until she left there. I could not tell how many reports I made to Mr. Chew in regard to the plaintiff, but I do not think I made but one. I had a letter from him in which he stated that he was informed that plaintiff had a dislocated hip and he wanted to know something about it, so I wrote to him then. I told him about her condition as far as I knew it on a regular report. I think I have made only one report to the defendant railroad company. I have not discussed the case with Mr. Chew since he left



Queen City, except when he was here at Court in January. I saw him in January and talked to him about plaintiff's case, and I have seen him here at this term of Court and talked to him about her case. I will state that what I have said here is the truth and nothing I have stated would be unethical. I certainly would not give anyone that asked for it a certificate of a lady's health, whom I was treating, if it was a reflection on her character. Whether or not I would give such information to the claim agent would depend upon whether or not it was a reflection on the patient or her family; and I know in this case there was no specific or infectious disease, or anything of that sort. In a case of this sort the question propounded by counsel has nothing to do with it, that is, whether when I am attending a patient and am privately employed it is against the ethics of my profession to give a written report to anyone that might call for it when the report might be antagonistic to the patient. I do not think there is anything unethical in the procedure I took. It is not true that I was appointed shortly after the first of the year as local surgeon at Queen City. As I have stated, I do not know just when I received the appointment, but I think it was some time in February. I did not try to act as a claim agent in getting plaintiff to settle, though I may have made the suggestion either after or before I was appointed local surgeon. I deny that I told the Reverend Mr. Griffith that the plaintiff's stomach was displaced and that was the reason my medicine had not been effective in stopping her vomiting. I do not remember having any conversation with the Reverend Mr. Griffith relative to plaintiff's case. Something may have been said to the Reverend Mr. Griffith about the case, but I do not remember the conversation. I do not remember



asking him to persuade the plaintiff to go on and settle; but I am sure I did not make any demand like that. I may have told Mr. Griffith that to settle was the best thing for plaintiff to do. If I did say that to him I meant what I said, as I understood she had a good offer of compromise. The offer of compromise was made for the injuries she had received. The injuries plaintiff received were alleged injuries. Plaintiff told me she was pretty badly shaken up in the wreck. I regarded plaintiff as very nervous, and I regarded her condition as serious. It was so serious that I put her on a cot, put her in a baggage car and took her to a sanitarium. I heard afterwards that Mr. Chew went to the sanitarium after plaintiff arrived there. I do not remember whether I notified Mr. Chew that plaintiff was in the sanitarium. I was not appointed to let Mr. Chew know about the movements of myself in this particular case; but when he would write me and ask me questions I would answer them. I do not know how many such letters he wrote. I would not say whether I had received as many as 12 or 10 or 8 or 6 such letters, but I suppose I have gotten as many as four, but I won't swear to four. The place on plaintiff's thigh was not just a boil; it may have started out as a boil, but it was just an open sore. It was about half an inch in diameter, and wasn't as large as a dime. Her nervousness continued after the boil healed. The boil was located on the upper portion of her thigh at the place I have indicated. After her nervous condition continued after the healing of the boil I did not attribute her nervousness to the boil altogether, though, of course, it aggravated her condition as it was inflamed when I saw it and was very sensitive. It makes no difference how simple those things are they will aggravate such cases. A neurasthenic is a per-

son who is suffering from nervous prostration. That is a serious condition, but they may recover in from 6 to 10 years. A great shock may produce neurasthenia. I have never had any experience along the line of neurasthenia; but I know that a person of a nervous temperament, who has been in a wreck and is thrown down on the floor and severely bruised, will have her condition aggravated by such accident. I could not say that plaintiff's condition was altogether attributable to the wreck she was in. I would not say that the wreck produced her condition as I had never seen the plaintiff before. If the plaintiff had been in good health prior to the wreck, and had these troubles immediately after the wreck, it is natural to suppose the wreck would be the cause of her condition—it would simply be a question of whether she was well or not before the wreck. It is possible that other conditions could have produced her condition. I saw the plaintiff on several nights after the wreck, and she paid me for my services. I did not make my reports to the railroad company, but I answered the inquiries of Mr. Chew. I am positive that the plaintiff's mother told me that the plaintiff was suffering with female troubles. That was some time between the 25th of December and the first of January. She did not say how serious the trouble was and never went into details, and I never discussed the case, but called Dr. Dale's attention to the matter when we carried her to Texarkana. I never discovered any evidence of female trouble in plaintiff. The plaintiff's mother spoke of the plaintiff's trouble as being a chronic trouble; and said that the plaintiff was timid and for that reason she had called my attention to the matter. I never mentioned the subject to the plaintiff and never treated her for that trouble. The plaintiff had no trouble in

that region and no tenderness over the lower part of the abdomen until later on. At first she did not complain of any trouble in that region, but after she returned from Texarkana she did. Her hip was also perfectly normal at that time, and I made an examination of her spine and discovered nothing abnormal about the spine or hip. I examined her from up between the shoulders all the way down and there was no abnormal condition of the bones and no particular spot where there was any trouble. If the plaintiff's hip is now deformed and her spine is curved, I think it has developed since she was first hurt, and I do not think it existed at the time I examined her. I do not claim to be an expert on the time of the development of these things. I know what malingering means. I would rather not say whether or not I think the plaintiff is malingering; but I will say that I think as far as she is concerned she thinks the matter is just as she states. I believe she and her family are nice people and that she thinks what she says. I account for the neurasthenic condition in this way, that neurasthenics get to thinking they are in worse condition than they really are. I have the highest regards for the family in every respect as far as that is concerned and really do not want to get mixed up in the matter.

### RE-DIRECT EXAMINATION.

If I met anybody and they asked me I would tell them a patient of mine had rheumatism, but I would not tell them if he had a loathsome disease. If some one had smallpox I would be sure to tell them. My letters was in reply to a letter from Mr. Chew in which he said he was informed that the plaintiff's hip was dislocated and he wanted to know the truth;

and that was after he made a trip to Pearsall after the plaintiff had returned there. As far as being in sympathy with the family in the matter at issue, I would have done anything I could for the family. The plaintiff would naturally have taken the advice of whoever she went to for it, either her lawyers or her doctors or her friends that she relied upon. I have never done any surgery along the line of removing a young unmarried woman's ovaries, and I would rather not answer the question as to whether the standard works on medicine regard it as improper to remove a young unmarried woman's ovaries for nervous prostration or neurasthenia; but it considered the proper thing to do where it is possible, to save one of the ovaries. The removal of the ovaries of a woman amounts to sterilization, just as the removal of the similar organs of a male does. I knew that if a settlement could be affected, it would be the best thing for the plaintiff. Of course I did not suggest to her what she should do or how much she should get, but I told her that if she could get a settlement it was the best thing to do in my opinion. If a person has anything which grates on their mind it will cause them to get in a worse condition instead of improving. Another thing that caused me to advise settlement was that I did not want to be tied up in Court, and if could be adjusted I would have been glad to have it done. The practice of removing a woman's ovaries is condemned, unless there is some malignant growth because of which it is impossible to save the tissues. As I stated awhile ago I would not have suggested an operation on plaintiff, because I do not do that kind of surgery. I spoke to Dr. Dale about having been informed that the plaintiff had female trouble. I thought if there was any trouble he could look after it while she was up there.

## RE-CROSS-EXAMINATION.

I am not anxious to get mixed up in any suit. I was not subpoenaed to come to Court; but I would have been had I not volunteered, or I would have had to give my deposition, which would have been the same thing. Dr. Moore, the Chief Surgeon of the defendant railroad company, told me to come to Court. He is at Marshall, Texas. It is true that the removal of a woman's ovaries is always done where it would endanger the life of the patient not to do so. I do not know Dr. B. F. Kingsley by reputation. The physician who performed the operation on a patient could tell better whether there was a malignant growth in the cavity than anyone else; but I am sure there was no such infection as travels up through the uterus and the fallopian tubes, because I am sure that the plaintiff is a perfect lady. There could have been a cancerous condition there, in which case the ovaries would have had to be removed. I am not willing to swear that every lady who has her ovaries removed is either a bad woman or has a cancerous condition. If Dr. Kingsley says that a certain condition existed with plaintiff's ovaries he ought to know more about it than anybody else. When the plaintiff got on the operating table she could not tell what was going to be done to her, but would have had to trust her surgeon. It is true that when a patient gets on the table they risk their life to the surgeon because they have to. I did not prepare the questions which counsel read to the medical witnesses, and I have never read them; but I think I have heard some of them. If they were very learned questions I do not suppose I had anything to do with them. I was in Judge Cobb's office and heard him speak of them. I could

not say who was present at the time. I do not know whether Mr. Chew was there or not. I could not say who prepared the questions.

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## DEFENDANT'S EVIDENCE IN CHIEF.

DR. JOHN R. DALE, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

My name is John R. Dale. I live in Texarkana, Arkansas. I have lived there about 12 years. My occupation is that of a physician and surgeon. I have practiced my profession for 40 years. I am a graduate of Jefferson Medical College of Philadelphia. I have a hospital in Texarkana, and have had same for about 11 years. The capacity of my hospital is 36 patients. My practice is along the line of general surgery. I have had a good deal more experience in surgery than the average practitioner. In fact, for the last few years my practice has been limited to surgery. I have had a good deal of experience with reference to surgical diseases of women. My operations run from 300 to 400 a years, and about 25 per cent of those pertain exclusively to women. That per cent is just an approximation. My results from operations on women are satisfactory. My reports of deaths, etc., which are similar to the reports made in Texas, compare favorably with any other institution of that kind. I remember the plaintiff, Miss Clara Hill. She was brought to my hospital on the 15th of January, 1912. She was said to have been brought in on a stretcher.

and I take it she was, but I did not see her when she came. I met her soon afterwards in her room. I visited her first in company with Dr. Strong, who brought her to my place. I found her nervous, enemic and a sick girl, poorly fed, poorly nourished, complaining of a sick stomach and tremors and so on. Those things were developed on my first examination. Dr. Strong spoke to me about the plaintiff having been in a wreck. The first examination was simply introductory, as in some cases the doctor has to get acquainted with the case to see how nervous the patient is. The plaintiff was also complaining of bruished places on her body, and I examined her for the bruises or scars and found none. That was something like a little over three weeks after the wreck had occurred that I saw her first. Dr. Strong told me about the plaintiff's female troubles and asked me to determine about it. He said the matter had been mentioned to him and he asked me to see if there was anything wrong with her in that respect. I keep a chart of the condition of all patients in my hospital. Such charts are kept by the nurses daily. I did not examine the plaintiff for fever, but I did take her pulse. During the plaintiff's stay in the hospital her chart shows no elevation above normal except maybe on one day when there was one and a fifth degree or some such small matter. I included the sick headache of plaintiff among her pains, and she had aches in spots over the body and numbness and so on. In the absence of any organic lesions I would call the plaintiff's condition a neurasthenic condition. An organic lesion is where we have a diseased condition of the organ itself. A diseased organ can be looked for at all ages. I would call a diseased organ one in which not only the function was impaired, but also where the health or life of the in-



dividual was endangered. Some female troubles are apparent to the ordinary observer; but to determine most cases of female troubles the patient has to be placed on a hard flat surface like a table and put in a certain position for the examination. I had the plaintiff brought up to my office by a nurse and I made the examination of her on my examining table. Such an examination could not be made on a bed unless the trouble was very apparent to anyone. Some forms of female trouble can be found by the patient standing. I never examine a patient for ovarian troubles with her standing up, because I can make a better examination on a hard table or surface. I never examine a patient for such troubles on a hard bed, as such an examination is not reliable, because you have to use a surface whereby the hips will not sink down and deceive you in the examination. I made a satisfactory examination of the plaintiff by putting her in the position I have indicated, and with one finger in the vagina and the other on the outside, and I found that the tenderness she complained of was superficial and not in the ovary. This examination which I made is the test necessary to determine whether the trouble was in the ovary. The patient knows, in such examination, what part of the body I am approaching; but the patient does not know that I am examining to find those particular things. When I made the examination of the plaintiff I found nothing abnormal about the womb or ovaries. I do not think I am mistaken about what I found. I also examined the plaintiff's pelvic viscera. As a result of my examination I found no disease or injury to the appendix or to any organ situated in the pelvis, nor to the womb. In fact the plaintiff told me she had never had any trouble, and remarked that after the examination. I did not examine the plaintiff un-



til several days after her arrival at the hospital. She was in my hospital two weeks in all, and I think I made the examination during the second week of her stay. It is my rule to limit company in all cases, especially where I suspect nervous conditions. After my examination of the plaintiff my opinion of her condition was a neurasthenic condition with an element of hysteria. The neurasthenic condition I discovered in plaintiff was the tired weak condition of the nervous system; and the hysteria was the pains, aches and increased sensibility. I found a tenderness along the spine, and I account for that through her nervous system, and would be a part which would come under the head of hysteria. In putting my fingers up along in the vagina and exerting pressure at one point I got a sensation of pain. I moved the plaintiff's uterus about and there were no adhesions there. I did not say the pain I found was in the ovaries, but was in the nerves overlying the parts. Thirty-five or forty years ago old Dr. Sims was the father of this branch of surgery, and he never undertook to explain the pain at the point I have indicated, but called it the "hysteria joint" because whatever the trouble was, the pain was most usually in the left side, low down. I did not examine the plaintiff and find an inability to stand with the eyes closed; that was simply locomotor ataxia, and I would expect that in her case. I did find the tenderness at the point where nine-tenths of such nervous cases complain of having it; and I found that tenderness over a certain spot in the spine as well as in the groin. When I saw the plaintiff I found no such condition as described by Dr. Kingsley, that is, that "her condition was so critical that it was impossible to get her on her feet to make certain tests." She got up on the second day and walked about and wrote letters, etc.

I do not know of any special thing which would prevent her from standing, as there are many things which might prevent her from standing erect. The extent of the lesion there would control as to whether she could stand on her feet or not; in other words, whether plaintiff could stand on her feet would depend upon the extent of the lesion at the point I have indicated. If the accident had had anything to do with that inability to stand, it certainly would have shown within the first three to 10 days after the accident. I examined the plaintiff in about a month after the accident. The plaintiff complained of tenderness along the spine and particularly at one spot. I examined her for that pain and also the pain in the groin or side. Fright or shock will produce the pain that she complained of; and it had nothing to do with female troubles. Shock, fright or anything of that kind, which are non-inflammatory and incapable of producing organic lesion, will produce that pain. I found nothing in examining her spine which would cause the pain, and I only went by what she said about the pain. I had the plaintiff to walk. I think I would have discovered it if plaintiff had any trouble with her spine at that time. If any injury had been done to the plaintiff's spine at the time of the accident it would have appeared at that time. A certain percent of curvature naturally exists with women. I have a great many women, who come to me for examination for other reasons, in whom I find this slight diversion. It can be congenital or acquired,—either born that way or comes as a result of habit or disease. It can be cured by braces, plaster-of-paris suits, etc. I examined the plaintiff's hip or thigh, as that was one of the points complained of. I found a scar there at the spot Dr. Strong spoke of, where there

seemed to have been a boil or an abscess. I do not know that the plaintiff complained of having a dislocated hip, but I would have known it if she had; as she could not have walked if she had had a dislocated or fractured hip. At that time the plaintiff was able to walk. I could not now attribute her condition in regard to her hip, as described by Dr. Kingsley, to the accident; because if the accident caused it, it would have been of sufficient gravity to disable her completely. In order to have the condition that Dr. Kingsley described, that would have resulted from injury received in the wreck, she would have had immediate disability, that is, she could not have gotten up and walked about. One may have a severe injury and not know it; but plaintiff could not have received such an injury as would have created inflammation in the ovaries and change the position of her womb without knowing it at the time, because the ovaries are so well protected, and to approach them there would have to be a fractured bone. In my opinion, before the plaintiff could have received the injury she claims, she would have had to receive a penetrating blow from the front. I found no such blow was given in my examination, and I saw no bruises or scars. There was tenderness in the spine and in the left side, but none in the pelvic bone. Plaintiff could not have received such a blow as to cause her condition without a destruction of the soft spots in such a way as would have been discovered; and I made no such discovery. In my examination I found no inflammatory action and saw no results of inflammation. I found no such condition as described by Dr. Kingsley, that is that her ovaries were enlarged and bound together by adhesive bands or adhesions as a result of the inflammatory condition, and ad-

hesions in all the pelvic organs about the womb. My examination was such that I would have discovered those conditions had they been present. There are various ways in which those conditions could have been caused; and there are various causes which will produce them; but they would not have been attributable to the accident because they did not exist at the time I examined her. If the plaintiff's ovaries were enlarged and bound together by adhesive bands or adhesions as a result of an inflammatory condition, the proper thing to have done would be to put the organs into position and use agents to reduce the inflammation and adhesions as far as possible by local means, such as hot water douches, glycerine tampons, etc., before resorting to surgical means. Those treatments failing, it would then be proper to open the abdomen and act discreetly after getting inside. In case I had opened the abdomen I would have broken up the adhesions. By breaking them up I mean separating them. That is done frequently and satisfactory results obtained. I would also have put the organs in proper place, after which the circulation would have been reestablished, and they would regain their normal position. A surgical operation would be necessary to put the womb in place if adhesions existed. I would not have taken the womb out. I could move the uterus or womb about when I examined the plaintiff and I did so. That would indicate a mobility of the uterus. Cysts on the ovaries is a normal condition for the ovaries to present. Cysts are present on a woman's ovaries during menstrual life; after the change of life, her ovaries atrophy and shrink up and do not have cysts. Cysts are evidence of menstrual life. They are an indication of health and would not impair her health. The proper treatment of the ovaries in the condition

described by Dr. Kingsley would be to remove the cysts. That could be done simply by taking them away, by opening the cysts and draining out the fluid. One would have to open the abdomen to reach the cysts; but it would not be necessary to remove the ovaries in the case described. I would have attempted to save the plaintiff's ovaries if they were in the condition described by Dr. Kingsley; or at least one or a part of one. I found no such conditions as described by Dr. Kingsley when I examined plaintiff. If the conditions described by Dr. Kingsley were not present when I examined the plaintiff, it is my opinion they could not have been caused by the injury which she claims to have occurred in December previous. My opinion is based upon my experience. In my opinion the plaintiff's condition when I examined her and when Dr. Kingsley examined her, was attributable to hysterical neurasthenia unquestionably because of these localized spots of tenderness or pain. The plaintiff said she felt well enough to go home, and I told her that she had better remain longer until she got stronger, but she insisted she was well enough to go home. I do not know of my personal knowledge that anyone came after her, but I understand her mother did come for her, and I am sure someone did. The plaintiff was improving under my treatment. Had the plaintiff remained in the hospital I would have expected a complete recovery. Such cases have to be kept away from sympathizing friends and kinfolks, as their presence will keep the patient's mind centered on herself. It is a kind of introspection, and the patient thinks about himself too much. I had a complete history of plaintiff's case when she was in the hospital. The condition of diseased womb, ovaries, appendix and fallopian tubes, as described

by Dr. Kingsley, are not usual and ordinary in a young woman or virgin, for three reasons. The first of these I will eliminate, because from my examination I know the plaintiff has never known a man. The next cause would be a direct puncture or blow or something of that sort. I do not think anything like an infection could exist in plaintiff from a blow. From the fact that the plaintiff was such a woman, free from suspicion, there could be no infection, and there could have been no injury to her womb unless it came from a penetrating blow. From my examination of the plaintiff there was nothing to indicate that she had received such a blow. If she had received such a blow she would have discovered it, in my opinion, just as soon as the shock or concussion had passed. She would not have been able to get off the train immediately after the collision and step up a high step with the assistance of her sister if she had sustained such an injury, but it would have been impossible if such a blow occurred.

#### CROSS EXAMINATION.

I do not testify very often. I have testified probably twice in the last four or five years. I only remember one case now in which I have testified in the last four or five years, and that was for an Express Company. I do not remember the style of the case now. The Texas & Pacific Railway Company was involved in that suit. I only recall one time that I have testified for a railroad company during the last 5 or 6 years. I ride on a pass by virtue of being Chief Surgeon of the Louisiana & Arkansas Railroad, which does not run into Texarkana; and I am also local surgeon for the Texas & Pacific.

When I received the plaintiff into the hospital I did not know anything about the nature of her trouble or where there had been an accident or how she came to receive her wound. I first learned that she had been in a railroad wreck when Dr. Strong brought her up to Texarkana. My conduct after she was brought there was not such as would indicate I knew my client was involved, but I made no report and treated it strictly as a private case. I had no right whatever to give anybody any knowledge of her condition except by the consent of the patient. I did tell the railroad company what I thought was the matter with the plaintiff; but it was in her presence and she accorded the party her room. That party was Mr. Chew. Mr. Chew came to my sanitarium two or three or four days after the plaintiff came. I do not know how he knew she was there. I had made an examination of the plaintiff before Mr. Chew came, but I made three or four examinations. I think I made my thorough examination about the beginning of the second week of her stay, which was after the claim agent had been there. I told the plaintiff that a settlement would be the best thing for her. I was not representing the Company, but I was representing what I thought would be a good prescription for her. I do not know about it being a good prescription for the Company. I think the Claim Agent wrote me twice, but I do not think I replied to them. I have not talked to the Claim Agent about the case since we talked about it in her room. He wrote me and told me what he was going to do, but I did not answer the letter. I did not see the Claim Agent and tell him what I thought about his predicate, nor did I use the word "malingering" in connection with the plaintiff. I did not tell the Claim Agent that I thought the plaintiff was



malingering or putting on, as I recognized the fact that she was suffering as she thought. The plaintiff is a neurasthenic, which is quite a different thing from malingering. I do not know anything about the charge in the defendant's answer that the plaintiff is malingering. I suggested several things to counsel in regard to questions to be propounded, against a private patient as in favor of a corporation client. I was paid by plaintiff for my work and I took her money. I have looked up medical authorities for the defendant's counsel since I have been in court; but I was admitted to the Plaintiff's room when Mr. Chew was there and she discussed the matter with him. I came to attend Court Monday morning, and have been in conference with the Claim Agents and making suggestions to verify my diagnosis, against the plaintiff who was my private patient. I found the plaintiff suffering with no female troubles. In other words if she ever had any female troubles she did not have them when I examined her. She was a perfectly healthy girl in those parts as far as I could see. I could not say that I know Dr. Kingsley by reputation, nor do I know him personally. I did not know he had been president of our Medical Association or that he was connected with all of our organizations, as I am not a resident of Texas, but live close to the line. I am not willing to swear that Dr. Kingsley is guilty of malpractice as charged; but I say that I would not have removed the plaintiff's ovaries under such conditions. I did not see the plaintiff's ovaries, but I know their condition from Dr. Kingsley's description. The statement he made that they were so diseased they had to come out was his opinion. He did not have to remove them for such a lesion. I have taken out a woman's ovaries quite often; but



it is not such a common practice as it used to be years ago. I could not say how many times I have taken women's ovaries out. I do not always tell any gentlemen that comes to the hospital just what is the matter with the ladies that are brought to my hospital to be treated. I told only those I thought were interested in the plaintiff's condition in this instance. I have taken both ovaries from a woman. I differ with Dr. Kingsley as to the cause of removal of the plaintiff's ovaries. He said they were so diseased they had to come out, but he described the condition there, and I would not have removed them for that cause. Of course, the plaintiff was not consulted about that, and she is not to blame. When the cavity was opened and the surgeon thought her ovaries ought to be out, the plaintiff could not be blamed for that. I have sworn positively that a woman who was in the wreck could not have been hurt in the manner she claims so as to lead to the complications which the evidence shows to have existed, and I do not think such a state of things could have followed without the accident producing more traumatism than it did. I know what traumatism the plaintiff had from what I discovered afterwards from a personal examination of the case. I knew how much traumatism she received because there was no evidence of any. I made my first examination of plaintiff's case the first day she came and every two or three days, going over the case. I live in another State and do not suppose I would have had to attend court here unless I wanted to. I was asked to come here by the Chief Surgeon, Dr. Moore. I have not made out my bill for my services yet, but I expect to charge \$75.00 or \$100.00 per day. I was here in January and charged them \$75.00. Traumatism can produce inflammation, and inflammation

necessarily produces adhesion; and I know that adhesions can involve the appendix, and that adhesions can involve the ovaries and all the female organs. It is true that inflammation could produce the same trouble that Dr. Kingsley found in this case; but concussion or shock will not do it. It must be a direct traumatism and penetrate the abdominal wall. Traumatism can be so severe as to dislocate the organs; and you would necessarily have to change the relation of the organs before you would have inflammation. I would look for a dislocation of the organs in a case where there was inflammation. You can bruise the abdominal wall and set up peritoneal inflammation, and peritonitis would result. That would not take some time, but I would expect it within a few days after the accident. I did find soreness in plaintiff, but that was from her nervous condition. I can feel soreness and tell whether it is produced by a nervous condition or by traumatism from the various elements entering into it. I mean by neurasthenia a high nervous condition. It may come from various causes. I have heard of neurasthenia coming from railroad wrecks, and traumatic neurasthenia is quite frequent, but not so common as traumatic hysteria. Plaintiff had neurasthenia with an element of hysteria. I take it from the history of plaintiff's case that she was a well woman up to the time of the accident, and I found nothing in my examination to the contrary. Fright will cause hysteria and neurasthenia. The only thing that the wreck had to do with plaintiff's condition in my mind would be to be contributory. There are two reasons why we die;—predisposition and an exciting cause. I believe a man may have a predisposition to have tuberculosis, but he may not die unless some exciting cause comes along. The plaintiff

was predisposed to nervousness and the exciting cause developed that predisposition. It is true that the railroad wreck might develop death. Therefore the railroad wreck cooperated with Nature in putting this plaintiff in the condition I found her. I think that the fright was sufficient to produce the condition I found plaintiff in; and after she became in that condition, she was impressionable, and became a prey to everything that comes along. I know that the Lord is responsible for the plaintiff being impressionable and not the railroad wreck. Fright and terror, in the absence of traumatism, is capable of producing the condition I found in plaintiff; and when fright is coupled with injury, it is more than apt to produce that condition; and when you have an organic lesion you eliminate the neurasthenia. In regard to the question of whether a person who is in a neurasthenic condition is more likely to be attacked by almost any kind of ill, you have to follow certain lines of predisposition, such as tuberculosis or a high strung nervous system, various things along that line; and fright adds to a majority of those things. For instance a very nervous man who is caught in a wreck and sees an approaching engine is hurt worse than another man would be that was not as nervous. The plaintiff's back and hip were all right. Supposing that the plaintiff's back and hip are all wrong now, I could not connect her condition with the accident as detailed to me. If plaintiff was all right in those respects when I examined her I do not think that a shock or traumatism developed the conditions as they now exist; and I think I am telling the truth about the matter. I do not think I am mistaken in saying that the results of the accident could not have produced her condition. I said in the beginning that her condi-

tion could have been congenital. Congenital means to be born with anything. I did not find the plaintiff's back or spine curved, therefore that was not congenital, and it had not been brought about by habit. If those conditions do exist now they were acquired. A person can acquire a curved spine in three or four months. I do not think the plaintiff is malingering in regard to her hip, but I do not recognize that condition of the hip existing at the time of my diagnosis. If it is conceded that it does exist now, then it has been acquired. The plaintiff has acquired her hip trouble if it exists today. I do not say that the plaintiff is trying to make the jury think the hip is hurt when it is not.

#### RE-DIRECT EXAMINATION.

If the plaintiff was subject to neurasthenia and her mind imagined there was something wrong with her, there is where the psychologist would come in. Suggestion has the effect of fixing a particular injury on a particular point. The plaintiff told me she had no female troubles. Upon the mind of a neurasthenic, to make an examination would have the effect of calling her attention to a particular point; and I deferred the examination of plaintiff until just before the second week of her stay in order to get her mind from any particular point of the body. Prior to the examination she had no tendency to leave the hospital. I do not know how long after the examination she had a desire to leave, but a few days before she did leave she expressed a desire to go home. If the plaintiff returned home improved and came on down to Pearsall, and there another physician examined her and discovered what I had not discovered, that is, a dislocated hip,

that would have had the effect, as I have stated, of fixing her mind on that point, and she would have protected that part of the body until the causes were removed. That would be true about any troubles she might have. Basing my answer upon the description of plaintiff's injury as specifically given by Dr. Kingsley, that is, that there were little minute cysts scattered around, that her womb was slightly enlarged and retroflexed, and her left ovary displaced,—I would say that was not such a condition as would require the unsexing of the plaintiff. I have found the cystic ovaries where they appeared like little bunches of grapes along the tubes. I was not conferred with by Dr. Kingsley at any time in regard to the plaintiff's case, nor was I asked for my opinion or anything about it. They knew she had been in my hospital and that she had improved there. I keep a chart for the information and benefit of the patients who come to my hospital, and I would have furnished any information requested by the doctors. They have never sought my opinion in any way, and have never communicated with me in any way. In every case my diagnosis is kept at my hospital. My opinion of her case is just as open to plaintiff's counsel as to the defendant's counsel, and I am willing for them to see it now. Traumatism is a severe injury or blow. I meant by a "penetrating" blow one that would go through the first structure, and I did not mean to go into the flesh and blood. The plaintiff's condition could have been caused by a direct blow, but if such blow was heavy enough to cause her trouble she certainly would have known it at the time.

### RE-CROSS EXAMINATION.

I did not tell the plaintiff, soon after she came to the hospital, that she had rheumatism. I do not remember, when I made my examination of plaintiff, of putting my arm around her and telling her she was as cold as a snake. I might say that I did not use that expression. The nurses were there and they can testify if anything was wrong. I never examine a patient unless the nurse is present. If I put my arm around the plaintiff in the presence of the nurse, I did so to quiet her.

### RE-DIRECT EXAMINATION.

Nothing of the sort just described by counsel occurred, and I make it a rule never to examine patients except in the presence of the nurses. In fact, I bring the patients to my office for that purpose and prepare them for that purpose. I am a family man, and am an elder in the Presbyterian church and a Thirty-second Degree Mason.

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### DEFENDANT'S EVIDENCE IN CHIEF.

THOMAS DORBANDT, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

I reside in San Antonio, and have resided here about five years. I am a physician and make a specialty of diseases of the nervous system. I have had experience in the examination of women for female

troubles. I did general practice for about ten years, and have been confining my work to diseases of the nervous system for about the same length of time. That special line of work does not necessarily embrace female diseases, but in order to make diagnosis we have to make examinations of that character. The removal of the ovaries of a young woman makes her unusually nervous and susceptible to all kinds of complaints that are not chronic but due to a lack of some condition supplied by the ovaries that we do not thoroughly understand. It is the same, for instance, as that of removing the testicles of a male; and has practically the same effect, and that condition lasts for quite awhile. I think I heard all the testimony of Dr. Kingsley. The fact alone of the appearance of cysts on the ovaries of the plaintiff, as described by Dr. Kingsley, does not indicate diseased ovaries, and such cysts belong there normally. The cysts have to do with the menstruation period that comes on each month, and are a part of them. I would not say that it was proper or improper practice to have removed the plaintiff's ovaries under the conditions stated by Dr. Kingsley to have been found; but it is a recognized rule to leave the ovaries where it is possible to do so. Where it is possible to do so the part of the ovary which is diseased is removed and a part left. Enlargement or the appearance of cysts would not require the removal of the ovaries. The causes which I recall now that call for the complete removal of the ovaries would be a cancerous condition of the ovaries, or a tubercular condition or an abscess, where there would be little cells or pockets of pus penetrating through the surface of the ovaries. None of these conditions would exist unless they were caused by infection. I could not imagine or recall any infection which would



produce the conditions found in this young woman, the plaintiff. In order for traumatism or a blow to produce the condition found in the plaintiff, such blow would have to be severe enough to bruise or mash the parts and destroy the circulation to rather an extensive degree, and would have to be of sufficient intensity to lacerate. If the blow had been of sufficient force to cause the condition found on plaintiff, it may not have been known to her immediately. It might have produced such a shock as to cause unconsciousness and she would not have felt the blow until 10 or 12 hours afterwards. She could not have walked at the time if the blow had been such as to have caused the injuries found on plaintiff, as the pain would have been very severe. Any examination which would have included the parts affected would have disclosed the injury. Such a blow as described, caused by being thrown forward in the aisle of the car and causing bruises on the leg and thigh, may have caused an injury to the ovaries indirectly, by catching the body in such a way as to jerk the ovaries or other organs out of place and bruise them. A blow would have to be very severe to jerk the ovaries out of place. If the womb was retroflexed it could be put in position by manipulation. An operation would not have been necessary to replace the womb if it were healthy. The adhesions found in plaintiff could be removed by separating the tissues that were adhered and breaking them apart with the fingers. That operation would not necessarily have required the removal of the ovaries.. Such an operation is the only way to treat the adhesions; but the inflamed condition of the ovaries could have been treated otherwise than by an operation, such as by the use of tampons, douches and things of that kind. If an unusually large number of cysts were found on the

ovaries, or if they were of unusual size, the proper treatment would be to pick them with a little lancet and replace the organs in the normal position. Until such course has been tried and has failed, an operation should not be resorted to, as there are other remedies besides taking out the ovaries which are frequently satisfactory. If the plaintiff had walked around immediately after the collision and had gone home to Queen City and was under treatment there and then went to the hospital at Texarkana and walked around there and improved under her treatment, and then came back to Queen City and went from Queen City to San Antonio, and from San Antonio to Pearsall and walked around there, it does not seem to me that such a case would indicate the necessity of an operation such as was performed on plaintiff. If the plaintiff was able to do what has been detailed in the previous question, my treatment and the treatment of a modern physician would have been confinement to bed largely, and a medical treatment such as I have mentioned, with tampons, douches and local applications and replacing of the uterus, and giving the patient the rest necessary to return to normal condition. From the testimony as I have heard it in this case I would pronounce the condition of the plaintiff to be hysteria. Hysteria is a condition of the nervous system in counter-distinction to organic disease. An organic disease is something that can be seen, or something that can be discerned by an external examination of the parts, as consolidation of the lungs. A hysterical condition is where you cannot put your finger on the point or organ where the disease is located. It might be located at one point at one time and at another point at another time, and it is something over which the patient does not seem to be able to exercise any will power or judg-

ment. If the conditions complained of by the patient actually exist it would not be hysteria. For instance, if the plaintiff actually had a dislocated hip there would be no hysteria about that. If the dislocation of plaintiff's hip were congenital she could use that leg. Some people are born with both hips dislocated and can get about in a way. If plaintiff's dislocated hip was not congenital and she had a sound hip when she got on the train, she could not have walked if that hip was dislocated in a wreck. She might have gotten along on the other foot. The plaintiff would certainly have known it at the time if she had dislocated her hip; and she would have suffered intense pain and would have been unable to use that foot. If plaintiff's hip were dislocated it would not be in its natural position. Plaintiff could not have stepped down out of a car onto the ground and walked around and gotten back up in the car if her hip had been recently dislocated; and the pain would have been sufficient to keep her in the car. Whether or not the displacement or curvature of the spine would have effected the plaintiff's condition would depend altogether on the degree of the displacement of the vertebrae. If it was very much of a displacement it would produce a paralysis of the parts below the dislocation. If it had been severe enough to produce paralysis it would communicate itself to the brain to a considerable degree. From the history in this case and the history as given by Dr. Kingsley, I would say that in my opinion the plaintiff could not have sat down and walked about as she did. I cannot conceive of an injury sufficient to cause the amount of inflammation as described by Dr. Kingsley and Dr. Kempt without a sufficient amount of evidence being produced immediately by the injury, such as discoloration, that would attract the attention upon examina-

tion by a physician or be so severe she would mention it herself, at least within 10 or 12 hours after the accident. If plaintiff had the trouble she described, I do not think she could have contained herself. I attribute plaintiff's condition to hysteria and neurasthenia combined. I would not say that the operation performed on plaintiff was not necessary; but I say that is not the usual method of treatment. I would not have operated had I been in control of the situation, as I do not perform operations at all; but I have operations done and I keep in touch with such things. It is the advice and practice of most surgeons to defer the removal of the ovaries until other means have failed to produce results. I would not, under any circumstances, have operated under the conditions found by Dr. Kingsley in this case until other means had been tried and failed to produce results. It is a rule among surgeons, where a patient has been in a hospital under treatment by a physician of ability to communicate with such physician who had had the patient in charge before operating and get all the history and data possible to be obtained.

### CROSS-EXAMINATION.

I have been in San Antonio about 5 years. My office is in the Moore Building. I have been employed in this case. I know Dr. Kingsley. He is recognized as one of our able men in San Antonio. I regard him in the class I would trust myself to under an operation, though he might not be my choice as a surgeon. I have based my opinion as to whether or not the plaintiff's ovaries should have been removed upon Dr. Kingsley's description of her condition; and I am willing to take his description as true. I

think I heard all of Dr. Kingsley's testimony; and I am frank to tell counsel that I am employed by the defendant; but I shall testify to what I think is the truth whether in favor of or against the defendant. Whether or not I have been consulting with council for the defendant depends upon what counsel would call "consulting." I have not been referring counsel to medical books, nor have I told them what questions to ask. Mr. Eskeridge, counsel for defendant, is the man who called me into the case and gave me a description of the case. I have talked with Dr. Dale and examined the sheets he kept while plaintiff was in his hospital; and I have talked with Dr. Strong, who preceded Dr. Dale in the case. I conferred with both of them and I have heard Dr. Kingsley's testimony. If the plaintiff was a strong healthy girl when she got on the train, and she went through the wreck and immediately afterwards she developed all the symptoms described, I would say the wreck could have produced that condition. The shock alone would have done it, independent of traumatism. I will admit that I can give no settled rule as to what effect a blow or fall will have on a person. One man may have a fall from a five-story house and not hurt himself much; and another man will step off a car and injure himself severely. So that I will not say that in the case here presented this plaintiff did not get a traumatism sufficient to have produced the inflammation in the pelvis. I am not willing to say that inflammation will not produce adhesions; but adhesions will be produced by inflammation. The adhesions may or may not increase gradually, like a fire, taking charge first in one place and then in another; but it depends upon what produces the injury. Some adhesions will spread and some will not. I have heard of such a thing as traumatic appendix;

and that is quite frequent. It occurs where shock sets up inflammation that involves the appendix. To involve the ovaries there would have to be some infection to have a continuous inflammation. It is like the case where a man who scratches his knee and the germs get into it and he has to have the leg cut off. In that case the beginning of the trouble is the scratch on the leg. The adhesions in a case like the plaintiff's, would begin at the height of the inflammation; and when the adhesions would begin depends on how long the inflammation has existed, and how high it goes. A low grade of inflammation of short duration would not produce adhesions; but it takes protracted inflammation to produce adhesions, and that takes time. The longer the adhesions stay the older they get; and a surgeon, going into the abdomen, can say whether the adhesions are recent or old if such adhesions are of comparative recent origin. I do not recall an injury now to the hip that would not come under the head of a dislocated or a broken hip. I have heard of a diseased hip joint; but I understood counsel to be asking about injuries and not diseases. It is true that traumatism may produce a disease and disease will produce trouble in the female organs as presented in this case. Anything that involves the female organs is called female troubles. Any extensive injury to the hip would naturally have to come under the head of a broken hip or a dislocated hip. Of course, one could have a flesh wound or gunshot wound in the hip, but I do not know of a dislocation or fracture or the bony part of the hip that would not come under the head either of a broken or dislocated hip. If one of the plaintiff's hips were elevated, then it would be an upward dislocation of the hip. A person may have a congenital

dislocation of the hip, where the dislocation has existed since birth.

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## DEFENDANT'S EVIDENCE IN CHIEF.

DR. HERFF, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

I have resided in San Antonio all my life, about 54 years. I am a physician and surgeon; and I have had quite a considerable experience as a surgeon. I have had experience as a surgeon in female troubles in a great many operations, and in the removal of the ovaries of young girls. Assuming that the testimony shows that the plaintiff was a young lady and was on a train and was in a collision; that she was seated in a chair car and was thrown forward and into the aisle and was bruised on her leg and thigh and back; that immediately following that she got up and walked out of the train and got on the ground and walked around and looked at the engines and came back into the car, sat down, and was detained there two or three hours and then went home—I would say that it would take a very severe blow to have injured the plaintiff's ovaries so that they had to be removed some six months afterwards, or to have injured her back and spine. The ovaries are so situated in the pelvis that it would have been very hard to have given them a direct blow. I do not say it is not possible to injure the ovaries by a blow; but a blow that would injure the ovaries would be noticed by the party immediately, and it would take



quite a severe blow, as the ovaries are so well protected. If the party's hip had been dislocated she would not have been able to use it without considerable pain; but she might have had a wrench of the muscles or ligaments and it would not have developed pain for two or three days. A person cannot use a dislocated hip immediately after the injury without a great deal of pain; and the limb might turn in or out; and such a dislocation would have shown itself within the next few hours. There is quite a difference in persons as to their hips being high or low. If any was severe enough to cause an injury to the spine it would have manifested itself and there would have been very severe pain at the time and there would have been paralysis. You can have an injury to the spine and it would produce a compression in the canal and paralysis would come afterwards. It would not necessarily follow, however; but it depends on the amount of pressure exerted on the spinal cord itself. However, there would be pain, which would manifest itself immediately. One can have an injury to the spine which does not manifest itself until some months afterwards. As far as that is concerned you can have an injury to the spine and not know it at the time, for instance, a concussion. In that case the symptoms will develop later on. If a person's spine is curved you can at least prevent it from getting more pronounced by putting on the proper appliances. Sometimes a back brace can be used. I hardly think there can be any walking in the case of a dislocated spine. Whether or not a young woman's ovaries should be taken out where a cystic condition exists depends upon the degree of cystic degeneration of the ovaries. The ovary may be degenerated to such an extent that it would be absolutely worthless. Under such circumstances the sur-

geon would be justified in removing them, but the conditions which follow the removal of the ovaries are such that every doctor dislikes to do it. I would not like to remove a young woman's ovaries unless I was compelled to. It would be a hard question to answer as to what I would have done had I found the conditions that Dr. Kingsley has testified he found in this young lady, unless I was there. I know Dr. Kingsley to be a good, conscientious man; and if he, in his judgment, thought it was necessary to do what he did, I think it was about all right. What I would have done would depend upon circumstances. Of course, my aim would be to save the organ if I could; and if I find the cysts are not too badly developed to interfere with the health of the organ, a part of the diseased organ could be taken out; but where there was a thorough degeneration, it would have to be removed. If both ovaries were affected, I would take out the one that in my opinion was inflamed to such an extent it could not be saved. Whether or not I would remove an ovary would depend upon the amount of cystic degeneration of the ovary. Dr. Kingsley may have thought the cysts were of recent origin, but I do not know how he could tell whether they were of recent or long standing. If I had found a condition of "little watery cysts scattered around" I would not have regarded that as such a condition as would require the removal of the ovaries in this particular case; but as I have stated before, my main object is to try to be conservative, but I am not always conservative because I cannot be. If I see it would be foolish to try to be conservative I do the radical thing. The ovaries are well protected. What the plaintiff's condition would indicate in regard to the accident would depend entirely upon the plaintiff's condition before receiving the injury. If she

was in perfect health before the accident, it stands to reason that the accident had something to do with her condition. It would require quite a severe blow to effect the womb. An injury or blow sufficient to produce a severe injury to the ovaries must be very severe, although one may have a displaced uterus or prolapsed ovary from a blow on the body which would not be recognized at the time, but would be later on. I could not say how long after it would be, as that is a question. It might be felt in two or three weeks or it might take longer. If an ovary is displaced or prolapsed it would produce symptoms later on by causing an inflammatory condition to take place; and when the inflammatory condition takes place our attention is directed to the trouble right then. The condition could be discovered at the time if it was a prolapsed ovary, and it could be replaced by the use of pessaries. Whether or not, in treating a young woman, it is the wrong thing to operate on her before giving her other treatment, depends upon the individual. I always try to avoid any operations like that, but when I come to my rope's end I go ahead and operate. I would follow up a treatment, if I found that the treatment was successful. It is possible for a young unmarried woman's ovaries to be in a diseased condition, such as was found by Dr. Kingsley when he operated on plaintiff, by a blow that would not have injured her apparently. One may have an indirect violence caused them, such as falling violently on one's buttock or on one's feet. It would not be absolutely necessary to receive the blow directly to the part affected. One can receive an injury to the uterus or ovaries by transmitted force by falling on the buttock or knees. If a blow occurs to the uterus it cannot always be remedied without an operation; though the doctor may do the

best he can by treatment. It is my rule to treat such cases before operating. If a fallen or displaced uterus sets up inflammation, the curing of the inflammation or trouble in the uterus would not necessarily relieve the trouble with the ovaries if the trouble were due to cystic degeneration. One may have cystic degeneration without having had a blow, as cystic degeneration is a disease. It is possible the cystic degeneration may have been present in plaintiff before her injury. Assuming that the plaintiff was a well woman before the accident, in order to bring about the condition of the ovaries found in her, it would require a severe blow, which would have been severe enough for her to know it, and which would have been severely painful.

### CROSS-EXAMINATION.

Unfortunately I do find it necessary to remove ovaries in my practice; and when I find it is necessary to preserve the life or better the health of a person I remove the ovaries, as it is necessary in my practice to alleviate human suffering and prolong life. Assuming I had a case where a girl was being treated by a physician in a neighboring town, and he advised an operation and then brought the girl to me and I found her in a very bad fix, run down and nervous and barely able to stand on her feet, and after a thorough examination I find she has some trouble with her ovaries and possibly the appendix, and I advised an operation and then the doctor and the girl go home and stay about a month; her condition gets worse and the girl comes back and I find the same conditions existing; and she has a regular physician treating her and he tells me her history; and the girl consents to an operation and I enter the

cavity, and find the ovaries so badly diseased as to endanger her life, and to be of no further service to her,—I would not hesitate a particle in removing the ovaries. I regard Dr. Kingsley as a specialist in the line of operations such as was performed on plaintiff. And I feel exactly like I would rather trust Dr. Kingsley judgment in the matter, where he had his eyes right on the patient, than to criticise him about something I did not see. The patient would have no voice in the matter of the operation if the doctor told her beforehand “you will have to leave this to me;” and in fact the surgeon ought to do just what he thinks best. Oftimes the surgeon has to do things after entering the cavity that he never dreamed of; and he would be justified in doing what he thought proper. Traumatism can produce inflammation; and inflammation can produce adhesions; and those conditions can proceed until they involve the whole pelvis. The adhesions form as the inflammation goes along; and it may extend over a considerable time before actual conditions result that become alarming. If a healthy young woman should get on a train, with everything all right, and she gets into a head-end collision, and is thrown to the floor, and picked up and put back on her seat; she became nauseated and feels numb, and dazed; but after awhile goes out to see the wrecked engines, and is then taken home and is put to bed; about five hours after the wreck a physician is called and she gets into a serious nervous condition and is sent to a sanitarium, and then comes home and on down to Pearsall and undergoes medical treatment there; and finally her condition gets so that she finds it absolutely imperative that an operation be performed, and it was performed—under that state of facts I would say that the blow the person received in the wreck had a good deal to do

with her condition. If the same person's hip was normal before the wreck, but since these troubles came on her hip has an upward tendency, and her spine is no longer in line, I would say the blow received in the wreck could have had something to do with it.

### RE-DIRECT EXAMINATION.

If the facts in the case were these: The party when called upon to tell whether she was injured at the time of the accident, stated she did not know whether she was injured or not, if it had been such an injury as claimed to her hip it seems to me she would have known it at the time. It is a hard matter to say whether cysts would be formed on a healthy young woman's ovaries by traumatism, and I really do not know. You can very seldom find a woman's ovary that does not have one or two cysts on it. I could not answer the question as to whether the best authorities say that cysts are not formed by traumatism, but I hardly see how traumatism could form them.

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### DEFENDANT'S EVIDENCE IN CHIEF.

HOMER T. WILSON, JR., having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

My name is Homer T. Wilson, Jr. I am a son of the Reverend Homer T. Wilson. I live in San Antonio and have lived there about 15 years. My pro-

fession is that of physician and surgeon. I have been practicing my profession in San Antonio for the past year, and altogether I have practiced for three years. I am a graduate of the University of Pennsylvania at Philadelphia, and from the Bellevue Hospital of New York City. I was in the Bellevue Hospital two years. That is a large institution and accommodates about 1500 patients, and is the largest of its kind in the country. I have not heard any of the testimony in this case. Presuming the facts to be that on December 22nd, 1911, there was a railroad collision in which one train, going at the rate of 18 miles an hour, ran into another train standing still; and the plaintiff, according to her testimony, was thrown from her seat forward, falling in the aisle and some people fell on her; in about an hour she went out of the car and walked five or six hundred feet to see the wrecked engines, got back in the car and went on to her station and got out of the car and into a hack and drove several miles; during this time she suffered no inconvenience except a little nausea,—I would say that I have never seen such a case and I could hardly conceive that the fall described would be responsible for her condition. The ovaries are glands in a female or organs of generation which correspond to the testicles in the male. The removal of the ovaries of a woman has the same effect as the removal of the testicles in a man; that is, it unsexes her, and it brings on a premature change of life. It would be impossible for a woman, whose ovaries have been removed, to raise a family. The principle of all surgery, in such cases, is to what we say conserve or save as much of the ovarian gland as possible, and not remove all of it unless absolutely necessary. If, as a hypothetical case, a patient should come to me and upon examination I find her with a little fever



and some tenderness over the abdominal region, and one enlarged ovary, and I cannot tell whether there are any adhesions or not, it would be a question whether or not such a case would be one not subject to medical treatment but subject to surgical treatment only. But our principle is to resort to surgical treatment only after medical treatment has failed to bring results. If a patient was improving under medical treatment I would continue the treatment. That applies to the case at hand as well as to other cases. It is a usual thing to find cysts on a woman's ovaries, and they will be developed on a healthy ovary. Ovarian cysts are so rarely connected with traumatism that traumatism is not usually considered to be a cause of cysts; but I do not believe it to be possible for ovarian cysts to be the result of traumatism; and traumatism is not put down as a cause of ovarian cysts. If upon examination I decided it was best to operate and I opened the cavity and found one ovary enlarged, and little minute, watery cysts on both ovaries and some in the fallopian tubes, and some recently formed adhesions on all the parts,—I will say that in such a case the mere fact that the ovary is enlarged does not necessarily mean that it is diseased; nor the fact that the ovary has cysts on it means that it should come out. In regard to the adhesions, the way to deal with those is to break them up and separate them and tie them off so as to prevent any further trouble. If only one ovary was diseased to the extent that I considered sufficient to remove it I would remove that ovary and leave the other; likewise, if one ovary and a part of another were diseased to such an extent that I had to remove them, I would remove the one and a part of the other and would attempt to leave as much as possible. I would not consider it necessary to remove the ovaries of a

young unmarried woman if all that was the matter was enlargement, and small watery cysts on the ovaries and in the tubes, and one of the ovaries displaced, because in removing the ovaries of a woman you produce an artificial change of life at a premature time, and that is followed by a nervous condition which is advisable to avoid, if possible. Any operation which involves opening the abdominal cavity is considered a serious operation. If a patient's abdominal cavity is opened and no infection sets up it is not a serious operation; but the patient has gone through a serious operation, though the results should not be permanent. It is frequently found that a person will have one hip or shoulder higher than the other, but more frequently the case with the shoulder than with the hip. We do not find people who are perfectly symmetrical very often.

### CROSS-EXAMINATION.

If a person had been perfectly normal prior to a railroad wreck as far as anyone could discover, and after the railroad wreck the party going through the collision and having more or less traumatism and injury, inconvenience or pain, felt in the hip at once and afterwards it continued to develop, and there was some elevation of the hip took place and some pain, whether the wreck had anything to do with that condition would depend entirely upon what I would find upon an examination, and I would want to know the degree of elevation. I would think that the wreck had something to do with it, as far as the pain was concerned, but not in regard to the deformity.

## DEFENDANT'S EVIDENCE IN CHIEF.

W. L. CHEW, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

I am Claim Agent for the Texas & Pacific Railway Company. I have been with that road since 1887. I am acquainted with Miss Clara Hill. I was raised Southeast of San Antonio, in Wilson County, and my folks have lived in San Antonio. I first met Miss Clara Hill in Queen City some time after the 10th of January, 1911. Her sister wrote me a letter stating that she was hurt and that Miss Clara Hill was hurt, and I went to see them. When I received her sister's letter was the first time I knew plaintiff was hurt. I think her sister wrote me about the first of January. The sister that wrote me was Miss Mamie Hill. After receiving Miss Hill's letter I replied to it and asked her to write me the extent of her injuries, and if she had had a doctor to give me his name and to send me a statement. I then received a second letter and I went to see them and talked to them. At that time the plaintiff was not disposed to settle with me. She was in bed, and I was not disposed to settle with her myself because she was in bed and I wanted to know how she was before settling with her. I did not make any effort to settle with plaintiff, but told her I would see her again soon. As Claim Agent for the railroad it was my duty to hunt up everyone that had been hurt, but Miss Hill had not been reported as hurt. On my first visit Miss Hill complained of injuries, but I do not remember how she said she was hurt. The next time I saw the plaintiff she was in Dr. Dale's sani-

tarium. I learned from our agent at Queen City that she was in Texarkana. In fact, I knew she was going there because we had a request from Dr. Strong to stop our train at Queen City and take her up, and knowing she was at the hospital I went to see her. The next time I saw her was at her father's house in Queen City, where I first saw her. She was up and about, walking about the room dressed. If the plaintiff was hurt she did not mention any specific injury. I do not know that she made any specific statement as to her injury at that time, though she claimed to be badly hurt. The first time she ever complained to me of an specific injury was at Pearsall, some time in May, if I remember correctly, when she said there was something the matter with her hip in addition to other injuries. I got the letters which counsel exhibits to me. If one of the letters mentions the hip, I learned about it just before the date of that letter, as I was in Pearsall and she told me that Dr. Williamson said she had a broken hip or dislocated hip joint which my doctors had not discovered. She told me that before she wrote me the letter on one of my visits to Pearsall previous to the receipt of the letter. I may have the facts wrong and may be stating what I got from her letter. I was in Pearsall in May, because her letter states it. That letter may be the first time I heard of the dislocated hip, and it was on that trip that Dr. Williamson explained to me about it. I had a talk with Dr. Williamson and he said the plaintiff's hip was broken or dislocated. I went to see Dr. Williamson about the plaintiff's condition, as she told me he was her doctor. Dr. Williamson said he found plaintiff had a dislocated hip which the doctors had not discovered, but he did not mention specifically any other injury which he had found. Prior to the operation there was no claim

except that her hip was dislocated, although she claimed to be injured. When I was trying to adjust this matter the plaintiff did not specify how she was hurt except that she was hurt and badly hurt. The letter there or her statement was the first intimation I had of a specific injury. Every time I went to see the plaintiff was after I had received a communication from her or her sister to come. A half a dozen or a dozen letters passed between us; and I went every time she wanted to see me. That was my duty as between the Texas & Pacific Railroad and the plaintiff.

#### CROSS-EXAMINATION.

I do not know S. M. Dubose, but I know his name. I do not recollect ever seeing him at all; nor did any of my special agents ever meet him. I do not recall his name for sure but I think I had a man to see Mr. Dubose. Mr. Charles Smith was the man who saw him. Mr. Smith lives at Pearsall. I did not instruct Mr. Dubose to write Miss Hill, the plaintiff's sister, a letter; and if he wrote her a letter I did not instigate it. I think I went to Pearsall three times, but it might have been more. I do not think I talked to anybody at Pearsall about the plaintiff, or inquire around about her health. I do not know whether Mr. Eldridge, who was summoned here as a witness, has gone home yet. I talked to Mr. Eldridge about this case once or twice, but not a great deal. I have no recollection of talking to anyone about the plaintiff's condition previous to filing of this suit, but I have talked to several people there since the suit was filed. I believe I talked to our doctor at Pearsall, who is the local surgeon of the I. & G. N. I talked to Mr. Eldridge at the depot for a few minutes before the

arrival of the train. I do not know when Mr. Strong was appointed local physician, as I have nothing to do with the appointments; but my remembrance is that Dr. Strong testified correctly when he said he was notified about February or March, or if he said January or February that is correct. I saw Dr. Strong on my first visit to see the plaintiff, I am pretty sure; and perhaps I saw him a second time. Every time I was at Queen City I would go to see Dr. Strong. I did not advise Dr. Strong to send Miss Hill, the plaintiff, to Texarkana, and did not have any information of her going there until I was notified the train was going to stop there at Queen City for her. I am not notified every time a train is stopped to pick up a passenger, but in this case I was. I was informed of every step of plaintiff. The dispatcher or train conductor notified me that the train had been requested to stop and pick up the lady who was hurt on the train. The employes of the train keep me posted of every move of those who claim to be hurt on our line. I saw Dr. Dale only once about this case at the time she was in his sanitarium. I had a very brief letter from Dr. Dale about the plaintiff. I wrote him asking what her condition was when she left there and he wrote me very briefly that she was gone and seemed to be improved, probably three or four lines. Then I had another letter from him, in reply to a letter of mine, in reference to the condition of her hip. He gave me no information in his reply. I think I have had two or three letters from Dr. Dale. I received three or four letters from Dr. Strong previous to the filing of this suit. He wrote me in reply to my letter as to how she was progressing. The first time I learned the plaintiff was going to be operated on was when she telegraphed me herself. I have that telegram. She said in the

telegram, "I am going to the sanitarium with the doctor tomorrow." That telegram is dated Pearsall, June 11th. I think she also wrote me that she was going to be operated on. I knew that plaintiff was coming to San Antonio to see Dr. Kingsley to be operated on, but just how I knew it I cannot recall at this moment. I knew she was going to be operated on, but I did not know what she was going to be operated on for. I did not say that Dr. Strong was the first person that told me the plaintiff was going to be operated on; but I told him. I am positive that Dr. Strong did not know she was going to be operated on; and he did not know anything about it until I told him. The letter handed me is correct (Exhibit "C"). It says here in the letter "I am informed of the necessity of the operation by Dr. Strong." Dr. Strong was in San Antonio and I asked him to come to see the plaintiff. The statement in my letter that Dr. Strong told me of the necessity of the operation is not exactly correct. The signature to the letter is mine. There is not a whole lot in this case that is not correct.

#### RE-DIRECT EXAMINATION.

In plaintiff's telegram she asked me if I could not come and see her; and Dr. Strong was here and went to see her and she told him the next day that she was going to be operated on, and then I wrote the letter just shown me. (Exhibit "C"). I notified Dr. Strong that the plaintiff was here in San Antonio for an operation, and he came down to see her at my request. When I learned she was going to be operated on that was the first news to me and I sent Dr. Strong to San Antonio to see her. The reason I sent Dr. Strong to see the plaintiff was because I had



seen the plaintiff at Pearsall and she looked so much better than she did up at Queen City that I really did not believe she needed an operation and I sent Dr. Strong to see her and to see what he thought about it. The plaintiff told me who the learned doctor was that was going to operate on her, but I did not know him. I either learned it from Dr. Strong or I learned it at the time of the operation. I sent Dr. Kingsley a long courteous message asking that the chief surgeon or consulting surgeon be allowed to be present at the operation. He did not reply to me at all, and I understood his action to be a refusal. I saw Dr. Kingsley afterwards, and I have had an interview with him recently. I also wrote him and asked him to tell me specifically what was the matter with plaintiff. I also sent him a lot of questions. He replied to me and refused to give me the information unless we paid him. He refused to tell what was the matter without a consideration.

#### RE-CROSS-EXAMINATION.

I remember being at Pearsall and going to see the plaintiff when she was sick and asking her if I could not send the company doctor out to assist in treating her. She told me she would be glad to have him. She has always been willing to submit to any aid we offered her. I did not send anybody to see her, but I had this idea, to send a doctor there to examine her. She told me she would be glad to have the doctor, but I never sent him. I do not know why I told plaintiff that Dr. Strong said the operation was necessary. Dr. Strong never told me that the operation was a necessity. I did not write something that was not a fact, but those things will slip in a letter sometimes.

### RE-DIRECT EXAMINATION.

I guess I have known Dr. Dale, who testified here, 10 or 12 or 15 years. He stands very high, both in the community in which he lives, and all over the Union; and I do not think there is a man in the country that stands higher than he as a surgeon and physician. I know his personal and moral reputation; and it is certainly as good as any man's in the world.

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WHEREUPON the defendant announced that it had closed its evidence in chief.

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### PLAINTIFF'S EVIDENCE IN REBUTTAL.

Dr. D. Berrey, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

My name is D. Berrey. I have been practicing as physician and surgeon about 26 years, and I have been practicing in San Antonio a greater part of that time. I hold the position of County Health Officer of Bexar County, Texas, and have held that position a little over 16 years. I was called upon, about May, 1912, in connection with Drs. Kingsley and Williamson, to examine plaintiff and give an opinion as to the advisability of an operation upon her. I examined the plaintiff at the Bexar Hotel in San Antonio, in connection with Dr. Kingsley and Dr. Williamson of Pearsall. Dr. Williamson gave me

her history, including her history during the time he had her under treatment. He said she had been having severe menses, that her nervous condition had been about as it was when we saw her at the hotel, and she had been suffering with pain in the region of the womb and ovaries. He also spoke about the condition of her hip and back. Upon examination I found the plaintiff had a temperature of 100 2-10ths, or somewhere along there; she was in a weak, run-down condition. I found she was extremely tender on both sides over the ovaries and also over the womb. Also found there was an elevation of the left hip bone, and that two of the vertebrae were out of line. Upon an examination of the vagina I found a retroflexed womb and a displacement of one ovary, but I do not remember which one. After talking the matter over with Dr. Kingsley and Dr. Williamson, and in view of the fact that the plaintiff had been suffering for quite awhile, and in view of her constant temperature and weak condition, I advised an exploratory operation, that is, to cut in and expose the ovaries and find out their condition, and if the condition justified an operation, to operate, and if they did not it was a comparatively simple matter to sew up the abdominal wall and there would be no danger connected with it. I was not present at the operation, and I do not know what condition the plaintiff's ovaries were found in. Dr. Kingsley stands as high as any man in San Antonio as a man or as a gynecologist or specialist in female diseases. If the facts were that the plaintiff got on the train in question in good health, and was in a head-end collision, in which she was thrown down on the floor and somewhat stunned by the fall, was helped up in the seat by her sister, sat there about half an hour feeling indisposed and having

some nausea, and afterwards got out of the car and looked at the two engines that collided, and came back and was carried home; she reached home in a few hours after the accident, and on the same day was put to bed and since that time has been gradually growing worse up to the time of the operation, —I would attribute her condition, of course, to the accident, as I would not know what else to attribute it to. A doctor always looks for a cause in order to get at the result. It would take direct violence to effect either the appendix or the ovaries, as the ovaries are pretty well protected. Of course, if a woman were thrown so as to double the body up and make a strong pressure against the womb or ovaries you might get a displacement in consequence of that pressure. I would think the position of the body would have as much to do with it as the force of the traumatism or blow. Anything that would have a bad effect on the nervous system might produce neurasthenia. If the plaintiff did not have neurasthenia when she got on the train and had it afterwards, I would be compelled under those circumstances to attribute the neurasthenia to the wreck. The removal of the ovaries of a woman unsexes her, prevents child bearing and has the same effect as the removal of the testicles of a male. Very often it produces a train of nervous disorders following their removal. The trouble to plaintiff's spine is very apparent, anybody can see it; and by actual measurement the left hip is an inch higher than the right and the condition of the spine is very apparent. It would be physically impossible to put on that condition; and malingerer would have no effect one way or the other. I regard the condition of her back and hip as serious; and they are permanent and will be there always. If those conditions were not pres-

ent when plaintiff got on the train and developed afterwards, I would not know what else to attribute them to except the wreck. As far as the ovarian troubles are concerned they might develop slowly. As far as the adhesions are concerned, they are the result of inflammation, and they come on gradually, and the greater length of time they exist the stronger they become.

### CROSS EXAMINATION.

If a plaintiff had a dislocated hip as described by counsel I do not think she could have walked on it; but I do not believe the plaintiff had a dislocated hip, but it is a fact that the hip is elevated one inch. How it was done I do not pretend to say. If her hip was natural it would be on a level with the other. Her hip was probably elevated by violence of some kind, but how I cannot say. It is a peculiar condition and one, which I will admit, I never saw before. I expect plaintiff would have known it at the time the hip was knocked up, and there would have been pain connected with it. If plaintiff had received a dislocation or fracture of the pelvic bones should not have walked out of the car. It would have cleared things up very much if an X-Ray picture had been taken of plaintiff's hip. I examined the plaintiff in May, 1912, and also examined her about three days ago. I think the subject of the X-Ray was spoken of at the time, but I do not know why it was not made. When I examined the plaintiff in May, 1912, she was stripped, and pretty much the same examination was made three days ago. She was in bed at the Bexar Hotel and was not on an operating table. She looks better now than she did in May, 1912; but her nervous or neurasthenic condition is

just the same. I could not say that it was very much better or very much worse, as I have only seen the plaintiff on two occasions. Mr. McKinley, her brother-in-law, called me to see plaintiff first, and Mr. Carter, her attorney, asked me to see her three days ago, with the view, I suppose, of being a witness. I do not know why I was not present when the operation was performed. When I examined plaintiff I discovered there was a dislocation of one ovary and some fever, and evidently some inflammatory changes going on inside. I also found the womb was twisted upon itself. I could feel the condition of the womb at the time, and I most assuredly knew it existed at the time. Whether or not I would have removed the plaintiff's ovaries had I cut in and found that the fallopian tubes had cysts on them, and that one ovary was displaced and both ovaries had a few scattered cysts on them of recent origin, would be a hard question to answer, as it devolves upon every man to do his best as his judgment dictates. If I had opened the cavity and found the plaintiff's ovaries diseased, and the tube itself was involved, and I found that in consequence of the inflammation the plaintiff's health had been run down and she was weak and nervous, with constant ovarian pains and that an operation was necessary to save her life, I certainly would have advised an operation. When I spoke of disease I meant ovarian inflammation, which may be caused from traumatism or diseases that will produce infection. Some times very large ovarian cysts will necessitate an operation. If I had found a few cysts on plaintiff's ovaries and nothing more, I would not have removed the ovaries. If plaintiff's condition at the time of operation, was "one of general inflammation throughout the pelvis and lower abdominal tissues;

the ovaries were enlarged and bound together by adhesive bands or adhesions as a result of the inflammatory condition, and in all the pelvic organs about the womb, the tubes and ovaries, and the adhesions were of comparatively recent origin," I do not know that I would have treated the adhesions first and separated them; but it would have depended entirely upon the condition of the ovaries. Certainly, the proper thing to do would have been to break up the adhesions. That is what I would have done with the adhesions. If the plaintiff only had a few of those adhesions I would have broken up the adhesions; but if I had found the ovaries enlarged, swollen, and inflamed and the whole pelvic cavity in a state of inflammation, in view of the history of the case, I would have been very much tempted to resort to their removal. Dr. Williamson never told me the plaintiff had a dislocated hip, but he said it was out of line and that he did not know what caused it, and neither did I. I did not say it took force to knock the hip out of line, but I say the hip is out of line. That condition might be congenital. Dr. Williamson gave me a history of the plaintiff's having continued fever and a nervous condition and obstinate constipation and a history of her general condition. I am taking into consideration, in testifying, the history as given me, but am guided more by what I saw myself. If the wreck occurred on December 22nd, 1911, and the plaintiff's temperature did not exceed normal up to the 30th day of January following, I would certainly attribute her nervousness to the wreck, taking for granted that everything else was normal, because I would not know what else to attribute it to. Temperature may come on at any time as a result of the inflammatory changes which were going on all the time. In an injury of that



kind rest is the proper thing to give the patient, and I am satisfied that at Dr. Dale's hospital the plaintiff had every attention and care; and if she did improve it was due to the care and treatment and rest which she got there. Whether or not the surgeon operating should have communicated with Dr. Dale and ascertain what happened at his hospital is a question that depends upon the individual man more than upon any special rule. If Dr. Dale had been a resident of San Antonio, I am sure he would have been communicated with, but being a long distance away, and the surgeon operating knowing the plaintiff's condition, I do not know that there was any special reason for communicating with him. If the railroad company's chief surgeon had asked to be present, I see no reason why he should not be present; and if it had been a case of mine I would not have objected to it in the least. If the physician who first treated the plaintiff had been in San Antonio at the time of the operation and wanted to be present, I am sure the surgeons operating would have allowed him to be present. I have known Dr. Kingsley for years, and I do not believe he would have refused to allow the physician who first treated plaintiff to be present; but whether he did or did not refuse I do not know. If he did refuse to allow the physician to be present he did what I would not have done. I would have given a young unmarried woman, such as the plaintiff, every chance possible to recover before removing her ovaries; that is regarded as conservative surgery, which is always good surgery. Good surgeons always go slow in removing a woman's ovaries, and they ought to go slow; but sometimes an emergency arises when the surgeon cannot go slow. When I saw the plaintiff she was having temperature, and

was in a weak, run-down condition, and her pulse was weak and irregular, and her condition would not have allowed her to run on in that way, as to do so would have likely caused her death. A hospital was the proper place for her, as a person can always be better treated in a hospital. I think plaintiff told me she had been in Dr. Dale's sanitarium. Being a neurasthenic, I do not think that the hospital was the place for her instead of an operation; because, as I have stated, from my understanding of her case I believed the knife was the proper thing for her. I base my opinion upon what I have been told as I only saw the plaintiff one time and was not present at the operation and know absolutely nothing about it. I was not invited to be present at the operation; and I do not know why. I do not believe there is any way possible for a doctor to curve the spine of a designing person; because in order to have a permanent spinal curvature you have got to have ossification of the joints, you have got to have the bones fastened together, so to speak, and you have got to have them solid. I do not see how that would be possible,—at least I have never heard of it. Whether or not a blow that would cause the conditions found in plaintiff's spine would have had to be of sufficient intensity to bring on paralysis would depend altogether upon the pressure on the spinal cord. The spinal cord communicates through the spinal column to the brain. If you get a pressure on the cord or a sufficient displacement of the cord you will have a hemorrhage in the cord and paralysis will follow, and everything will be dead from that point down. I cannot say that I have been in consultation with plaintiff at all, as I have only met her here in the court room. It is true I have talked with Mr. Carter, her counsel. I do not think it is any reflection

on a doctor to testify voluntarily, but if a doctor is informed in a case and is called upon to testify in that case, he should go ahead and testify, whether it be against or in favor of the defendant.

### RE-DIRECT EXAMINATION.

I was called upon by the plaintiff simply to give my opinion about entering the cavity. I was called upon by the plaintiff's brother-in-law to examine her and give an opinion in her case as to whether she should submit to an operation. I advised that the cavity be opened. In ovarian or abdominal troubles, the surgeon is perfectly justified in opening the cavity to find out what conditions exist, and that was my view in this case; and the physician who does open the cavity and sees the conditions as they exist knows best what to do; and he knows just what is there when he sees it, just like seeing his hand before him. I have not advised with counsel in this case further than to tell him what testimony I would give and what I thought about the case. To advise counsel how to conduct the case is entirely out of my jurisdiction.

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### PLAINTIFF'S EVIDENCE IN REBUTTAL.

J. B. Eldridge, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

My name is J. B. Eldridge. I live at Pearsall, Texas. I am in the mercantile and farming business

there. I have been in Pearsall and Frio County about 22 years. I have not been in the mercantile business all that time, but have been in business there for 22 years. I was summoned by the defendant to testify in this case. The defendant's counsel told me I could go home and if they needed me they would phone me. I know the plaintiff, Miss Clara Hill. I have known her since I have lived at Pearsall. When I moved to Pearsall she was a child, and I have known her from babyhood. She was working for me at the time she left on this trip to Queen City. She was working in a general merchandise store, selling dry goods and groceries. At the time she was working for me her health was perfect so far as I know, and I never heard her complain. She did good work for me. I think she worked up to the day prior to leaving on the trip. She looked to be in perfect health when she left. I have seen her since the alleged wreck and there is lots of change in her appearance.

#### CROSS EXAMINATION.

I called at the office of counsel for defendant several days ago and he asked me what I knew about the case, and I asked him if he needed me and he said he did not think so, and that so far as I was concerned I could go home and if he needed me he would 'phone me. I think the plaintiff worked for me about two years. Her sister was not working for me at that time. The plaintiff was constantly on her feet at my place of business, and was busy the biggest part of the time. She was standing up through the day, and day after day. I thought the plaintiff was a strong girl as she did the work of a strong girl and never complained to me. She looked to be

healthy, though she was not very large. I think that plaintiff weighed about 112 pounds. That weight girl would be rather a small girl, but she had good color and never complained of being sick or anything of that kind. I would not call the plaintiff a slender girl, though she is a small girl. When the plaintiff left to go to Queen City she said she wanted to spend Christmas with her mother. I am not sure whether the plaintiff had spent the Christmas prior to that with her mother or not. When the plaintiff came back to San Antonio from Queen City, I did not come to San Antonio to see her, but I was here on other business. I think Miss Mamie Hill, plaintiff's sister, wrote me in regard to sending her sister to take plaintiff's place, and she did send her sister to work until the plaintiff could get able to work. I do not remember the date Miss Mamie Hill wrote me in regard to her sister, but it was after Christmas. I could not say where the plaintiff was when Miss Mamie Hill wrote me about her sister coming to work for the plaintiff. Some of plaintiff's folks told me that the plaintiff had been to Dr. Dale's sanitarium and had returned to Queen City, but I have forgotten the date of their letter, and I could not say whether it was in the latter part of January or in February or March, but it was somewhere about that time. I met the plaintiff at the Bexar Hotel when I got here in San Antonio. Mr. McKinley also came up from Pearsall with me, but I cannot say whether his wife came or not. Mr. McKinley is the plaintiff's brother-in-law. I did not hear the letter read in evidence here in which the plaintiff said she had turned her case over to Mr. ————. When I came to San Antonio I did not meet plaintiff at the depot, but the first time I saw her was at the Bexar Hotel. I do not know what she was doing,

but I went to the hotel and sent for her and she came from her room. I do not think she came downstairs, but I think her room was on the same floor as the parlor. When she came she was walking. I do not remember whether I left first or she, but I was not there very long. I could not say when I left San Antonio for Pearsall. The plaintiff returned when I did to Pearsall. My wife was here at the time and was stopping out on the east side of town and we all went back together. I remember I got a cab and went by and got the plaintiff at the hotel and went down to the train together. The plaintiff came down in the elevator at the hotel, but I do not remember whether I assisted her from the elevator to the cab or not. I think she walked right along though. I think plaintiff was able to walk when she got to the train, and I did not see anything unusual about her walk. She got to the train in Pearsall in the same way. When we were here I know Mr. Kinley did not secure the services of an attorney, as I went with him and we talked with Mr. Lewis and got some advice from him, but we did not secure his services at that time. I do not know whether Mr. Lewis saw the plaintiff at that time or not, but I heard him say he thought he would go and see her that evening. I am a friend of the plaintiff's family, and I am assisting her financially. I am helping her all I can and am very much interested in her case. All I did was to use my influence as that was all I could do.

#### RE-DIRECT EXAMINATION.

I have not done anything improper in this case, and I have conducted myself properly. The Mr. Lewis I went to see was Mr. Perry J. Lewis. He advised me to settle the case if the railroad would do what was right.

## PLAINTIFF'S EVIDENCE IN REBUTTAL.

Mrs. Georgia Hill, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

Dr. Strong is not correct in his testimony that I told him the plaintiff had taken patent medicine. If my daughter ever took any patent medicine I never knew it. Dr. Strong asked me about the plaintiff having female troubles. He mentioned the subject first, and I never dreamed of such trouble until he asked me about it; and I told Dr. Strong that if the plaintiff had any female trouble I did not know it. I had not seen the plaintiff for seven months and Dr. Strong had a better opportunity for examining her himself than I did. I never knew of the plaintiff to have any female troubles and she had been in perfect health up to the time of the accident. I heard about the time Dr. Strong received his commission as local surgeon; and I think it was along in January. That is, I heard it. Immediately afterwards Dr. Strong's conduct changed considerably, and he went to work on her to try to get her to settle her case, because he thought the company had offered her a reasonable sum. The conversations about patent medicine occurred after Dr. Strong was appointed railroad surgeon, and he told someone that the plaintiff had been taking patent medicine, and he asked me and I said No, I did not know anything about it, and he asked the plaintiff and she said she had, and I told him I knew nothing about it. Dr. Strong was the first person to mention the question of plaintiff's female troubles to me, and he was the one that circulated the report, as everyone in Queen



City said so, and I think he did it after he was appointed railroad doctor.

### CROSS EXAMINATION.

I do not know what time in January it was I heard that Dr. Strong was appointed railroad physician, but I think it was along the middle or latter part, or it might have been on the first. The plaintiff was in Texarkana two weeks in January. It was in January Dr. Strong's attitude toward the plaintiff changed. He did all he could for the plaintiff, but he changed so that I spoke about it. He did not change in his treatment of the plaintiff. No offer of compromise was made the plaintiff while she was in Texarkana, but Mr. Chew made her an offer of \$500.00 before she went to Texarkana. My daughter Mamie, who was not badly hurt in the wreck, took it upon herself to write Mr. Chew, and I did not say one word one way or the other about the matter. Mr. Chew did not come to see the plaintiff until he was written for. I did not know that at the time Dr. Strong's attitude changed he thought that a settlement was the best thing for plaintiff and would cure her quicker than anything else; and he never told me that it would do her more good in relieving her mind and condition than any medicine that could be taken, though he may have told the plaintiff that. Neither did the plaintiff tell me that Dr. Strong had said that. I do not want to reflect on Dr. Strong as I think he is a perfect gentleman.

## DEFENDANT'S EVIDENCE IN REBUTTAL.

DR. S. P. CUNNINGHAM, having been duly sworn, testified as follows:

### DIRECT EXAMINATION.

My name is S. P. Cunningham. I am a physician and surgeon, and have been practicing for 15 years. I am a graduate of Tulane University at New Orleans. I have had experience in surgery, and am local surgeon for the International & Great Northern Railroad. I have discussed this case with counsel for defendant at their request, and they have sought information from me. I was not present when Dr. Kingsley testified. If a young woman, such as the plaintiff, had experienced a shock which would have been sufficient to injure the ovaries, it would certainly have caused some external evidence. She would have at least seen something and would have felt some pain immediately. I have never seen a person who was able to walk immediately after having their hip dislocated or fractured. A hip one inch out of place would be far enough out of place to be out of normal position. I would certainly think there would be some symptoms evidenced immediately following a blow severe enough to cause curvature of the spine, and the person would not have been able to walk. I do not think the plaintiff could have walked as soon after the accident as she did had she had a dislocated hip or even had a jar severe enough to cause curvature of the spine at the time. As a rule, if a young woman's ovaries are cystic, the cysts should be opened up and the ovaries should not be removed. If the ovary has some condition where it is

thoroughly diseased, the cysts should be opened up; and if the cysts were large enough to involve a part of the ovary, a part of the ovary should be taken out and a part left, as the removal of an ovary has a tendency to increase nervousness. A person would get well after the removal of the ovaries, but the nervous state of the person naturally increases. Some times her nervousness will increase for years until she gets through with the entire change of life, which will be anywhere from 2 to 5 years. If an examination of a patient showed me that her womb was retroflexed or bent back, and there was a few adhesions of recent formation on the ovaries and ovaries and some cysts on the tubes and ovaries and the ovaries were enlarged, I should think the conservative thing to do would be to open the cysts and drain them, and to treat the tubes and replace the womb and break up the adhesions. Many healthy women have wombs which are not in normal position, and there is no indication of that until they have some symptom to show them the displaced womb. In the case of a young woman who worked in a store continually, it would have a tendency to produce displacement of the womb because of being on her feet continually; and especially is this true right along during the menstrual period when the womb is heavier than at other times. The condition plaintiff was in is likely to have been the result of continuous overwork or strain, or things of that kind. As a rule and according to the best authorities and to the concensus of opinion, if a neurasthenic's attention is called to her pelvic organs, it rather enhances her symptoms instead of diminshing them.

### CROSS-EXAMINATION.

Whether or not a young lady could displace her ovaries by standing on her feet, would depend upon her movements, that is, whether she reached up and strained her arms. Especially would it be apt to occur when the ovaries and womb were a little heavy. A railroad wreck might produce the condition plaintiff was in, but that would depend upon the amount of shock she received. Vomiting is one of the symptoms of shock, but plaintiff would not have necessarily had to vomit within 5 minutes after the accident to have placed the accident within the range of a shock sufficient to have injured her ovaries and womb. I know that traumatism will produce inflammation and that inflammation will produce adhesions, and that adhesions may involve the appendix. If the plaintiff got on the train in a perfectly sound condition and was in a headon collision, in attributing her injuries to the wreck or other causes, I would be governed entirely by the symptoms after the wreck. I did not examine the plaintiff; but if she suffered pain immediately after the wreck, and vomiting occurred later and a doctor had to be called, I would say traumatism probably caused her trouble.

### RE-DIRECT EXAMINATION.

If the plaintiff had received such a blow that it brought about the injuries complained of, she would have had some symptoms and some pain and fever with it. If she did not have these symptoms I do not believe the blow was sufficient to produce her condition.

## PLAINTIFF'S EVIDENCE IN REBUTTAL.

Miss Clara Hill, having been recalled, testified as follows:

### DIRECT EXAMINATION.

I believe Dr. Strong did ask me about having female troubles. I told him I did not think I had any; I did not have any symptoms of it that I could tell. I also told him about taking two bottles of patent medicine. I told him the truth just as I have told it here. When I was in Dr. Dale's Sanitarium, Dr. Dale did not tell me at first what the matter was with me, but after I became able to walk to his office he examined me and said I had rheumatism, and I told him it was strange if I had rheumatism as on the morning of December 22nd was the first time I had ever had anything like that; and he said: "Well, it works like rheumatism." I did not want to be operated on; and I waited until I saw that an operation was the only thing to save my life. My mother and sister were with me when I was operated on, but they were not in the operating room. The pains were so severe I had to have some relief and therefore consented to an operation. I paid Dr. Dale for his services rendered me while I was in his sanitarium. I was Dr. Dale's patient. I remember when Mr. Chew came to the sanitarium. After he came, Dr. Dale talked about settling my case. I do not remember just exactly what he said, but he talked to me about settling it. Dr. Dale proved offensive to me in one respect. After the first examination that he made of me, and after I was able to walk out in the hall, I was sitting out in the hall one afternoon; and he asked me if I would come into his room.

and I went in and he caught me in his arms and loved me just like I was a baby; but I was a lady, and in a few minutes a nurse came and he made the second examination; and remarked, "You are as cold as a catfish," and if I had ever given him any cause for it I do not know what it was.

### CROSS EXAMINATION.

I was alone in the room with Dr. Dale at the time. He embraced me in his arms and made the remark, "You are as cold as a catfish." That was all he said; and in a few minutes he called the head nurse and made the second examination. The head nurse was called Miss Estes, I believe. Dr. Dale made the remark I have just testified to just before the second examination. As well as I recollect Dr. Dale called in the nurse when he made the last examination. I do not remember what day it was, but some time in January, along toward the last. That was the examination he made of my person. He made one examination before that, but did not seem to be satisfied with it. He made two examinations of my organs, and it was at the last one that he made the remark I have just described. I did not make the statement, after Dr. Dale made his examination, that I knew I had nothing wrong with my uterus and ovaries. I did not make that statement to the nurse; but I went back to my room and cried bitterly and the nurse came to my room and said "Dear, I wouldn't cry." Miss Nelson was the nurse who saw me. As far as I knew Dr. Dale was a nice man, and why he did me that way I do not know. I stated at Dr. Dale's sanitarium two weeks in all. I did not stay there any longer than I could help after the occur-

rence I have described. I did not tell my mother about it as I was ashamed to. After I got home from Texarkana, something was said about taking me back to Texarkana, and I said "Oh, don't take me back there," and I commenced to try to tell mamma, but I could not tell her for crying. I could not tell my father such things. I do not remember telling anyone else about it except my mother. I first told about it here at court the other morning. I first employed a lawyer after I was operated on. I did not employ one before I was operated on, although I did communicate with them. Mr. Chew came to see me when I was first hurt, about the second week, I think; and when he came he asked me if I would accept \$500.00. By the expression in my letter "coming across" I did not mean big damages; but I had reference to what I thought I deserved.

WHEREUPON Plaintiff rested her case.

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THEREUPON the Plaintiff rested.

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#### DEFENDANT'S EVIDENCE IN REBUTTAL.

Dr. John R. Dale, having been recalled, testified as follows:

#### DIRECT EXAMINATION.

A record of the plaintiff was kept by the nurse from the time plaintiff went to my hospital. That is always done. Possibly 800 or 1000 ladies have



been placed under my care for treatment similar to the plaintiff. I have a good corp of nurses. The plaintiff was constantly under the surveillance of a nurse except a few days when she walked around. There were nurses around all the time. We have a day nurse and a night nurse, and whoever has to do with keeping the sheet writes her name on it. I am a man of family, having a wife and two girls and two boys. When I travel about I generally have my family or some member of my family with me. I heard the plaintiff's statements a few moments ago. I desire to deny in toto the statements made by her. Nothing of the kind described by her occurred there. Take a nervous girl or unmarried woman, approaching an examination or "ordeal" as they call it, they get nervous over it; and I may have said to plaintiff "Don't be excited, don't get nervous over it," but in making my rounds and while in my office I have a nurse with me. Anything I did, of course, would have been for the purpose of quieting the plaintiff's nerves, like I would a nervous child; and I have quit several examinations because the patient would get nervous and upset; and to quiet her I would say, "You are nervous and we will defer this until some other day." I never had any improper motive toward the plaintiff. She is a nervous, sick, hysterical girl; and I would not be called upon to defend a reputation of that kind. There may be some of my people here or they can be telegraphed at Arkadelphia or Texarkana.

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**THEREUPON** the Defendant offered in evidence the two letters identified by the Plaintiff, which were admitted by the Court and marked Exhibits A and D, and made a part of this record.

THEREUPON the Plaintiff offered in evidence the letter identified by the witness W. L. Chew, which was admitted by the Court and marked Exhibit C, and made a part of this record.

THEREUPON both sides rested their cases.

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EXHIBIT A

Pearsall, Texas.

May 9, 1912.

Mr. W. L. Chew,

Dear Sir: After talking with you last Friday, I have since consulted my Bro Law Mr. McKinley about the matter. And I have decided to let a lawyer have my case against you, unless you all come across with the amount I ask for, with in the next fifteen days.

It will be impossible for me to make the trip to Dallas, as you wished. But will remain here awhile longer under Dr. Williamson treatment.

Trusting this matter will be adjusted soon. I beg to remain,

Yours truly,

(Miss) CLARA HILL.

The following endorsements are on the back of the above letter:

No. 182

Clara Hill vs. T. & P. Ry. Co., et al.

Filed May 15, 1913

D. H. Hart, Clerk.

EXHIBIT B

Melon, Texas,  
April 15, 1912.

Mr. W. L. Chew.

Dear Sir: Your letter received a few days ago, have been real sick since I last wrote too you. the doctor I had with me, discovered my hip bone was of place said he hated to discourage me, but he didnt think I ever would be strong again, about two or three weeks is about as long as I am up at the time. I am at my sister now, but will be back at Pearsall in a few days. So if you want to come it is all right with me, I am sure you can settle with me

have put in such a reasonable claim.

Your friend,

CLARA HILL.

The following endorsement are on the back of the above letter:

No. 182

Clara Hill vs. T. & P. Ry. Co. et al.

Filed May 15, 1913.

D. H. Hart, Clerk.

In the District Court of the United States, in and for the Western District of Texas, at San Antonio.

EXHIBIT "C"

THE TEXAS & PACIFIC RAILWAY CO.  
Legal Department

Office of  
General Claim Agent  
W. L. Chew  
General Claim Agent

Dallas, Texas,  
June, 15, 1912.

Miss Clara Hill,  
Santa Rosa Hospital,  
San Antonio, Texas.

Dear Miss Hill:

I expected to come to San Antonio and see you Monday but have just learned from Dr. Strawn of the necessity of your operation. I regret very much to learn that you are to have this severe operation and trust that you will go through it safely and be entirely restored to health. I sympathize with you very much. After you have gotten up and want to see me or at any time that you want to see me, I will come to San Antonio at once and see you. Ask Dr. Kingsley to let you write me or telegraph me or get him to do so, so that I can see you and get your claim settled for you without a law suit.

Hoping that I may see you soon and that you will be restored to health and well, I am,

Yours very truly,

WLC-T

(Signed)

W. L. CHEW.

General Claim Agent.

P. S. If your operation should be postponed and you should want to see me and Dr. Kingsley thinks it would do you to talk to me about your case, send me a telegram to that effect and I will come down any day that you may wish to see me.

United States of America, Western District of Texas.

I, C. E. Pinckney, hereby certify that I was the Official Court Stenographer in and for the United States District Court, Western District of Texas, on the 13th day of May, 1913, that upon said day and the three days following I reported in shorthand the case of Clara Hill vs. Texas & Pacific Ry. Co., tried at San Antonio, before the Honorable T. S. Maxey. That the above and foregoing 185 and fraction pages, contain a true and correct transcript, in narrative form, of my shorthand report of said cause.

Given under my official signature at San Antonio, Texas, this 11th day of July, A. D., 1913.

C. E. PINCKNEY.

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The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for Defendant, then and there in open Court in the presence of the jury, and before the jury retired duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed nunc pro tunc, as of May the 16th, 1913.

Dated this 13th day of October, 1913.

T. S. MAXEY,  
Judge.

BILL OF EXCEPTION NO. 6.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

No. 182—*Law.*

I. & G. N. Railway Co. and the Texas & Pacific Ry. Co.

Bill of Exception No. 6.

Be it remembered that on the trial of the above stated cause, on the 16th day of May, 1913, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 5 on Special Charge No. 2, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired, as follows:

“If under the instructions herein given you, you find for the defendant, the International & Great Northern Railway Company, I further charge you that you cannot find for the plaintiff against the Texas & Pacific Railway Company, and you will so find.

W. T. ARMISTEAD,  
Attorney for T. & P. Ry. Co.

Refused.

T. S. MAXEY,  
Judge.”

Defendants contend that there was testimony introduced that justified submission of the foregoing

charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 5.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc*, as of May the 16th, 1913.

Dated this 13th day of October, 1913.

T. S. MAXEY,  
Judge.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and Texas & Pacific Railway Co.

Bill of Exception No. 6. Refusal Special Charge Requested.

Filed October 14, 1913. D. H. Hart, Clerk.

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### BILL OF EXCEPTION NO. 7.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

No. 182.—Law.

I. & G. N. Railway Co. and the Texas & Pacific Ry. Co.



Bill of Exception No. 7.

Be it remembered that on the trial of the above stated cause, on the 16th day of May, 1913, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 5 on Special Charge No. 5, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired, as follows:

“If you believe from the evidence that the plaintiff had the operation performed, as alleged on account of hurts received in the accident, you cannot consider any injury that came to her from the same unless it came as a result from the shock received in said train or from concussion, there being no allegation in plaintiff’s pleading that the injury was received in any other way; and in considering the injuries received from them or from the collision, you will disregard every element of injury that could flow entirely from traumatism, that is, a blow of some kind.

W. T. ARMISTEAD,  
COBBS, ESKRIDGE & COBBS,  
Attorneys for Defendants.

Refused.

T. S. MAXEY,  
Judge.”

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from in-

spection of the testimony set out at length in said Bill of Exception No. 5.

The Court refused to give said instruction to the jury, to which ruling of the Court, Counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc*, as of May the 16th, 1913.

Dated this 13th day of October, 1913.

T. S. MAXEY,  
Judge.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and Texas & Pacific Railway Co.

Bill of Exception No. 7, Refusal of Requested Charge.

Filed October 14, 1913. D. H. Hart, Clerk.

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### BILL OF EXCEPTION NO. 8.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

No. 182.—Law.

I. & G. N. Railway Co. and the Texas & Pacific Ry. Co

Bill of Exception No. 8.

Be it remembered that on the trial of the above stated cause, on the 16th day of May, 1913, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 5 on Special Charge No. 3, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired, as follows:

“Defendants request the Court to charge the jury that if they believe the train upon which plaintiff claims to have been hurt, did get off the track or rather run into a switch on a side track unexpectedly, as the switch was set for the side track instead of the main line by some party unknown to the defendant and without any fault or negligence on its part, then you will find for the defendant.

W. T. ARMISTEAD,  
Attorney for Defendant.

Refused.

T. S. MAXEY,  
Judge.”

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 5.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the pres-

ence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc*, as of May the 16th, 1913.

Dated this 13th day of October, 1913.

T. S. MAXEY,  
Judge.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and Texas & Pacific Ry. Co.

Bill of Exception No. 8. Refusal of Special Charge.

Filed October 14, 1913. D. H. Hart, Clerk.

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BILL OF EXCEPTION NO. 9.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

No. 182.—*Law*.

I. & G. N. Ry. Co. and the Texas & Pacific Ry. Co.

Bill of Exception No. 9.

Be it remembered that on the trial of the above stated cause, on the 16th day of May, 1913, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No.

5 on Special Charge No. 6, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired, as follows:

“If you believe that the plaintiff’s condition as alleged by her, was brought about by reason of her prior condition and her acts and conduct thereafter, and any injuries resulting from the operation, and the others would not have occurred except for the result of her own negligence in having said operation performed, as no person of ordinary care and prudence would have undergone, and notwithstanding the alleged act of negligence upon the part of the railroad, the present injuries are the direct and immediate result of said act, following in natural and unbroken sequence, and the railroad company was not guilty of any negligence resulting from her alleged injuries which were the proximate result of her said accident in the defendant’s trains of cars, but was on account of her own carelessness and want of care in allowing said operation to take place, which was the proximate cause of her injuries, you will find for the defendant.

W. T. ARMISTEAD,

COBBS, ESKRIDGE & COBBS,

Attorneys for Defendants.

Refused.

T. S. MAXEY,

Judge.”

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from in-

spection of the testimony set out at length in said Bill of Exception No. 5.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc*. as of May the 16th, 1913.

Dated this 13th day of October, 1913.

T. S. MAXEY,  
Judge.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and Texas & Pacific Railway Co.

Bill of Exception No. 9. Refusal Special Requested Charge.

Filed October 14, 1913. D. H. Hart, Clerk.

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### BILL OF EXCEPTION NO. 10.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill

vs.

No. 182.—*Law*.

I. & G. N. Ry. Co. and the Texas & Pacific Ry. Co.

Bill of Exception No. 10.

Be it remembered that on the trial of the above

stated cause, on the 16th day of May, 1913, after all the evidence in said cause had gone to the jury, all of which evidence is fully set out in Bill of Exception which is annexed with the Bill of Exception No. 5 on Special Charge No. 9, requested and made a part hereof, for all of the facts proven on said trial and on point herein preserved, and thereupon counsel for the defendant requested the Court to charge the jury before it retired, as follows:

“You are instructed that if you believe from the evidence that at the time the plaintiff was operated upon that she was a neurasthenic and was suffering from neurasthenia, and that she was influenced to submit herself to the surgical operation when it was not necessary and when other treatment would have entirely cured and relieved her, and that she did not use and exercise ordinary care, and such want of care, if you believe she did not exercise proper care, caused her to select a doctor when it was not necessary, and that her act contributed to the injury, then the railroad company would not be responsible in damages for the consequences of the operation that was performed upon her; and you will in summing up the amount of damages you find she was entitled to, if any, not consider the operation upon her and the removal of any of her organs in finding a judgment and assessing damages against the defendant, but will only assess such damages as arose from the injury otherwise than as hereinabove instructed.

W. T. ARMISTEAD,  
COBBS, ESKRIDGE & COBBS,  
Attorneys for Defendants.

Refused.

T. S. MAXEY,  
Judge.”

Defendants contend that there was testimony introduced that justified submission of the foregoing charge, and sufficient to require the Court to leave to the jury the consideration of all such issues in connection with the testimony, as will be seen from inspection of the testimony set out at length in said Bill of Exception No. 5.

The Court refused to give said instruction to the jury, to which ruling of the Court, counsel for defendant, then and there in open Court in the presence of the jury, and before the jury retired, duly excepted to the refusal of the Court to give said charge and reserved this, their Bill of Exception, and the same was noted to the end that the matter thereof might be placed of record, and the same is now here accordingly done and signed *nunc pro tunc*, as of May the 16th, 1913.

Dated this 13th day of October, 1913.

T. S. MAXEY,  
Judge.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and Texas & Pacific Ry. Co.

Bill of Exception No. 10. Refusal of Special Requested Charge.

Filed October 14, 1913. D. H. Hart, Clerk.

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### BILL OF EXCEPTION NO. 11

In the United States District Court, Western District of Texas, San Antonio Division.

Clara Hill

vs.

No. 182—Law.

I. & G. N. Ry. Co. and Texas & Pacific Ry. Co.



Bill of Exception No. 11.

Be it remembered that on the 8th day of July, 1913 in open court came on to be heard the defendant's motion for a new trial, together with the affidavits and other documents attached to this bill, all referred to as a portion hereof, and the Court having duly considered said motion, overruled the same and the defendant did then and there in open court except and reserve its bill and the same was noted to the end that the matter thereof might be placed of record and the same is now here accordingly done and signed nunc pro tunc, as of July 18, 1913.

Dated this 13th day of October A. D. 1913.

T. S. MAXEY,  
Judge.

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The State of Arkansas  
County of Miller

BEFORE ME, the undersigned authority, on this day personally appeared Mrs. Childress and Miss Nelson, each of whom, after being duly sworn, depose and say:

That during the month of January, 1912, they and each of them were nurses in the sanitarium of Dr. J. R. Dale, in the city of Texarkana, Arkansas, and that on or about the 15th of that month, Miss Clara Hill became an inmate and patient in said sanitarium, under the treatment of Dr. Dale, and that each of them became acquainted with her; that they in connection with Mrs. Estes observed and kept the charts or records of the case of Miss Clara Hill, and that the same is a true and correct record of her case, while she was in the sanitarium of Dr. Dale.

They, and each of them, further say that they are familiar with the management of said sanitarium during the time when the said Miss Clara Hill was a patient there and that it was the universal practice of Dr. Dale to have a nurse present at all times with female patients, and that he did so on all occasions when Miss Hill was a patient in said sanitarium, and that at the time Miss Hill was a patient there, she had a room on the ground floor of said sanitarium upon which floor all of the rooms were occupied by patients, and in addition there were from two to five nurses on said floor at all hours.

They, and each of them, further say that the testimony of the said Miss Hill to the effect that upon one occasion Dr. Dale mistreated her by disrespectful conduct as recited in her testimony, cannot be true, as there was always someone present whenever Dr. Dale was with any female patient, and that they know of no such treatment and never heard of any such until they heard of Miss Hill's testimony. They further say that her testimony to the effect that she went back to the room and cried bitterly, and that the nurse came to her room and said "Dear, I wouldn't cry" is not true, and they say that they were the nurses who attended her, and that they are in a position to know that such a thing did not occur.

KATHERINE CHILDRESS,  
MISS NELSON.

SUBSCRIBED and sworn to before me this the  
27th day of May, A. D. 1913.

CATHERINE O'TOOLE,  
Notary Public, Bowie County, Texas.

State of California  
County of Kings.

BEFORE ME, the undersigned authority, this day personally appeared Miss E. V. Estes, who deposes and says:

That during the month of January, 1912, she was a resident of the State of Arkansas and was head nurse at the sanitarium of Dr. J. R. Dale in the city of Texarkana, Arkansas. Affiant says that on or about January 15th, Miss Clara Hill became an inmate and patient in said sanitarium under the treatment of Dr. Dale; that affiant was head nurse and in charge of nurses and patients in said sanitarium and at that time became acquainted with the said Clara Hill; that affiant is familiar with the charts or records kept in said sanitarium showing the progress of each case and that the charts or records at said time were under her observation and said records are true and correct, and that the record or chart kept of the case of Miss Clara Hill was under her observation and is a true and correct record made of the case of the said Clara Hill while she was in the sanitarium of Dr. Dale. Affiant further says that she is familiar with the management of the said sanitarium during the time when the said Clara Hill was a patient there, and affiant says that it was the universal practice of Dr. Dale to have a nurse present at all times with female patients and that he did so on all occasions when Miss Hill was a patient in said sanitarium and that at the time said Clara Hill was a patient there she had a room on the ground floor of said sanitarium and that all of the rooms on said first floor were occupied by patients and that there were from two to five nurses on said floor at all hours.

Affiant further says that she has been furnished with a copy of the testimony of the said Clara Hill on the trial of her case in the United States Court at San Antonio in respect to the conduct of Dr. J. R. Dale and that she has carefully read the same and affiant says that the said testimony of the said Clara Hill is false, and especially that portion of her testimony wherein she testifies as follows: "I went back to the room and cried bitterly, and the nurse came to my room and said, 'Dear, I wouldn't cry.'" Affiant says that nothing of this kind occurred and could not have occurred without affiant's knowledge.

MISS E. V. ESTES.

Subscribed and sworn to before me, the undersigned authority, at Hardwick, Kings Co., Calif., this the 28 day of May, 1913.

V. J. WEANT,  
Notary Public.

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EXHIBIT 11.

DALE SANATORIUM.  
Texarkana.

Name: Miss Hill. Physician: Dr. Dale.  
Entered: Jan. 15. Date: Jan. 15, 1912. Nurse:  
Smith & Smith.

Hour: 5. Remarks: Entered.

Hour: 5:30. Temp., 99 3-5. Pulse, 80. Resp., 20.

Remarks: Was carried in on stretcher.

Hour: 6. Remarks: Very quiet.

Hour: 7. Remarks: Dr. Strong called.  
Hour: 7:30. Medicine: R. 80346 capsule. Remarks:  
Very quiet.

### NIGHT REPORT.

Hour: 8. Remarks: Sleeping.  
Hour: 9. Remarks: Sleeping.  
Hour: 10. Medicine: R. 80346 capsule. Remarks:  
Sleeping.  
Hour: 11. Remarks: Sleeping.  
Hour: 12.  
Hour: 1. Medicine: R. 80346 capsule.  
Hour: 2. Remarks: Awake.  
Hour: 3. Remarks: Sleeping.  
Hour: 4. Medicine: R. 80346 capsule.  
Hour: 5.  
Hour: 6. Temp., 97. Pulse, 80. Resp., 18. Med-  
icine: Magnesia 1 glass.  
Hour: 7:30. Remarks: Had good night.

### DAY REPORT JAN. 16.

Hour: 7:30. Nourishment: Sem-liquid.  
Hour: 8:30. Medicine: Magnesia 2-3 glass.  
Hour: 9:30. U., 1. D., 1. Remarks: Good stool.  
Hour: 10. Remarks: Sponge bath. Clean linen.  
Hair combed.  
Hour: 11. Remarks: Sister called.  
Hour: 12:30. Medicine: Simple Enema. Nour-  
ishment: Sem-liquid: Remarks: Good results.  
Hour: 12:30. Nourishment: Serve liquid.  
Hour: 1. D., 1. Remarks: Very quiet.  
Hour: 2. D., 1. Remarks: Asleep.  
Hour: 3. Remarks: Sister called.  
Hour: 4. Temp., 97 3-5. Pulse, 84. Resp, 18. U.,

1. D., 1. Remarks: Large stool.  
Hour: 5.  
Hour: 5:30.  
Hour: 6. Remarks: Very quiet.  
Hour: 7:30. Remarks: Had good day.

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DALE SANATORIUM.  
Texarkana.

Name: Miss Hill. Physician: Dr. Dale.  
Entered: Jan. 15. Date: Jan. 16, 1912. Nurse:  
Draper & Childress.

Hour: 8.  
Hour: 9. Medicine: Tonic 1 dram.  
Hour: 10. Remarks: Sleeping.  
Hour: 11. Remarks: Sleeping.  
Hour: 12. Nourishment: Lunch. Remarks: Sleeping.  
Hour: 1. Remarks: Sleeping.  
Hour: 2. Remarks: Sleeping.  
Hour: 3. Remarks: Sleeping.  
Hour: 4. Remarks: Sleeping.  
Hour: 7. Temp., 97 2-5. Pulse, 72. Resp., 20.  
Medicine: Tonic 1 dram. Remarks: Face and  
hands washed.  
Hour: 7:30. Remarks: Had good night.

DAY REPORT JAN. 17, 1912.

Hour: 7:30. Nourishment: Very light.  
Hour: 8. Medicine: Cascara 20 drops.  
Hour: 9. Remarks: Sponge bath. Clean linen.  
Hair combed.

Hour: 10. Remarks: Resting very well.  
Hour: 10:30. Remarks: Sister called.  
Hour: 11. Nourishment: Water.  
Hour: 12. U., 1. Medicine: Tonic 1 dram. Remarks: Specimen of urin tested. Analysis negative.  
Hour: 12:30. Nourishment: Light.  
Hour: 1. Medicine: Cascara 25 drops.  
Hour: 2. Remarks: Sister called.  
Hour: 3. Remarks. Sat up for 30 minutes.  
Hour: 4. Temp., 98 2-5. Pulse, 88. Resp., 20.  
Hour: 5. Medicine: Tonic 1 dram.  
Hour: 5:30. Nourishment: Full.  
Hour: 6. Medicine: Cascara 30 drops.  
Hour: 7. U., 1.  
Hour: 7:30. Remarks: Had good day.

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DALE SANATORIUM.  
Texarkana.

Name: Miss Hill. Physician: Dr. Dale.  
Entered: Jan. 15. Date: Jan. 18, 1912. Nurse:  
Nelson & Childress.

Hour: 7:30.  
Hour: 8:30. Remarks: Light out; patient very quiet.  
Hour: 9. Medicine: Tonic 1 dram.  
Hour: 10. Remarks: Sleeping.  
Hour: 11. Remarks: Sleeping.  
Hour: 12. Remarks: Sleeping.  
Hour: 1. Remarks: Sleeping.  
Hour: 2. Remarks: Sleeping.  
Hour: 3. U., 1. D., 1. Remarks: Good stool.

Hour: 4. Remarks: Sleeping.

Hour: 5. Remarks. Sleeping.

Hour: 6. Temp., 97 1-5. Pulse, 78. Resp., 20. Remarks: Sleeping.

Hour: 7. Sleeping.

Hour: 7:30. Remarks: Had good night.

### DAY REPORT JAN. 18, 1912.

Smith and Draper.

Hour: 7:30. Nourishment: Very light.

Hour: 8. Medicine: Cascara 20 drops. Remarks: Sponge bath. Clean Linen. Hair combed. Sitting in chair.

Hour: 9. Remarks: Writing.

Hour: 10. Remarks: Railroad Claim Agent called.

Hour: 10:30. Remarks: Lying down.

Hour: 11.

Hour: 12. Medicine: Tonic 1 dram.

Hour: 12:30. Nourishment: Light.

Hour: 1. Medicine: Cascara 20 drops, R. 80385 applied to back. Remarks: Walking over halls.

Hour: 2. Remarks: Writing letters.

Hour: 3.

Hour: 4. Temp., 97 4-5. Pulse, 88. Resp., 70. U., 1. D., 2. Medicines: R. 80385 applied to back.

Hour: 4:30. Medicine: Tonic 1 dram.

Hour: 5:30. Nourishment: Light.

Hour: 5:45. Medicine: Cascara 20 drops.

Hour: 7. Remarks: Had good day.

Hour: 7:30.



DALE SANATORIUM.  
Texarkana.

Name: Miss Hill. Physician: Dr. Dale.  
Entered: Jan. 15. Date: Jan. 18, 1912. Nurse:  
Draper & Childress:

Hour: 8. Remarks: Quiet.  
Hour: 9. Medicine: Tonic 1 dram.  
Hour: 10. Remarks: Sleeping.  
Hour: 12. Remarks: Sleeping.  
Hour: 2. Remarks: Sleeping.  
Hour: 4. Remarks: Sleeping.  
Hour: 5. Medicine: Liniment applied.  
Hour: 6. Temp., 98. Pulse, 74. Resp., 18.  
Hour: 7. U., 1. D., 1. Medicine: Tonic 1 dram.  
Remarks: Face and hands bathed.  
Hour: 7:30. Remarks: Had good day.

DAY REPORT JAN. 19, 1912.

Hour: 7:30. Nourishment: Very light.  
Hour: 8. Medicine: Cascara 20 drops.  
Hour: 9. Medicine: Liniment applied. Remarks:  
Sponge bath. Clean linen. Hair combed.  
Hour: 10. Remarks: Walked up to parlor.  
Hour: 11. Remarks: In room reading.  
Hour: 12. Medicine: Tonic 1 dram.  
Hour: 12:30. Medicine: Liniment applied. Nourish-  
ment: Very light.  
Hour: 1. Medicine: Cascara 20 drops.  
Hour: 2. Remarks: Gone to Dr. office. Exami-  
nation.  
Hour: 3. U., 1. Remarks: Walked to toilet.  
Hour: 4. Temp., 98. Pulse, 80. Resp., 20. Medi-  
cine: Liniment applied. Remarks: Writing.

Hour: 5. Medicine: Tonic 1 dram.

Hour: 5:30. Nourishment: Light. Remarks: Patient ate all of supper and enjoyed it.

Hour: 6. Medicine: Cascara 25 drops.

Hour: 7. Medicine: Liniment applied. Remarks: Resting very quiet.

Hour: 7:30. Remarks: Had good day.

(Patient on returning to room after a thorough examination by Dr. Dale in the office laughingly said she knew she had nothing wrong with uterus and ovaries.)

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### DALE SANATORIUM.

Texarkana.

Name: Miss Hill.

Physician: Dr. Dale.

Entered: Jan. 15. Date: Jan. 20, 1912. Nurse:

Draper & Childress.

Hour: 8. Remarks: Sleeping.

Hour: 9. Medicine: Tonic 1 dram.

Hour: 10. Medicine: Liniment applied. Remarks: Sleeping.

Hour: 11. Remarks: Sleeping.

Hour: 12. Remarks: Sleeping.

Hour: 2. Remarks: Sleeping.

Hour: 4.

Hour: 5.

Hour: 6. Remarks: Face and hands washed.

Hour: 7. Medicine: Tonic 1 dram. Liniment applied. Remarks: Had good night.

DAY REPORT JAN. 20.

Hour: 7:30. Nourishment. Light.  
Hour: 8. Medicine: Cascara 30 drops.  
Hour: 9. Remarks: Sponge bath. Clean linen.  
Hour: 10. Remarks: Gone to Dr. office.  
Hour: 10:45. U., 1. D., 1. Medicine: Liniment applied to back. Remarks: Good stool.  
Hour: 11. Remarks: Lying down.  
Hour: 12. Medicine: Tonic 1 dram.  
Hour: 12:30. Nourishment: Light.  
Hour: 1. Medicine: Cascara 20 drops.  
Hour: 2. Medicine: Liniment applied. Remarks: Writing.  
Hour: 2:45. Remarks: Walking around.  
Hour: 3. Remarks: Reading.  
Hour: 4. Remarks: Walking around.  
Hour: 5. Medicine: Tonic 1 dram. Liniment applied. Nourishment: Light.  
Hour: 5:30. Medicine: Cascara 30 drops.  
Hour: 6.  
Hour: 7:30. Remarks: Had good day.

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DALE SANATORIUM.  
Texarkana.

Name: Miss Hill. Physician: Dr. Dale.  
Entered: Jan. 15. Date: Jan. 20, 1912. Nurse:  
Draper & Childress.

Hour: 8.  
Hour: 9. Medicine: Tonic 1 dram. Liniment applied.  
Hour: 10. Remarks: Very quiet or asleep.

- Hour: 11. Remarks. Sleeping.  
Hour: 12. Remarks: Sleeping.  
Hour: 1. Medicine: Liniment applied. Remarks:  
Sleeping.  
Hour: 2. Remarks: Sleeping.  
Hour: 3. Remarks: Sleeping.  
Hour: 4. Remarks: Sleeping.  
Hour: 5. Remarks: Sleeping.  
Hour: 6. Temp., 97 3-5. Pulse, 70. Resp., 20.  
Medicine: Liniment applied. Remarks: Face and  
hands washed.  
Hour: 7. Medicine: Tonic 1 dram.  
Hour: 7:30. Remarks: Had good night.

DAY REPORT, JAN. 21, 1912.

- Hour: 7:30. Nourishment. Light.  
Hour: 8. U., 1. D., 1. Medicine: Cascara 25  
drops. Large stool.  
Hour: 9. Medicine: Liniment applied. Remarks:  
Sponge bath. Clean linen. Hair combed.  
Hour: 10. Remarks: Father and sister called.  
Hour: 11. Medicine: R. 80433 capsule. Remarks:  
Walked up to parlor out on porch.  
Hour: 11:15.  
Hour: 12. Remarks: Still sitting on porch.  
Hour: 12:15. Nourishment: Light. Remarks: In  
room.  
Hour: 1. U., 1. D., 1. Medicine: Liniment ap-  
plied.  
Hour: 2. Medicine: R. 80433 capsule. Re-  
marks: Vomited capsule.  
Hour: 2:20. Nourishment: Hot water. Remarks:  
Sister and father called.  
Hour: 2:25. Medicine: R. 80433 capsule. Remarks:  
Capsule repeated.

Hour: 3:30. Temp., 98 3-5. Pulse, 72. Resp., 20.  
Hour: 4. Medicine: Liniment applied. Remarks:  
Walking around.  
Hour: 5. Medicine: R. 80433.  
Hour: 5:10. Nourishment: Light.  
Hour: 6.  
Hour: 7. Medicine: Liniment applied.  
Hour: 7:30. Remarks: Had good day.

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DALE SANATORIUM.  
Texarkana.

Name: Miss Hill. Physician: Dr. Dale.  
Entered: Jan. 15. Date: Jan. 21, 1912. Nurse:  
Draper and Childress.

Hour: 8. Medicine: R. 80433 capsule. Nourish-  
ment: Ice.  
Hour: 9. Remarks: Sleeping.  
Hour: 10.  
Hour: 11. D., 1. Medicine: R. 80433 capsule.  
Hour: 12. Medicine: Liniment applied. Remarks:  
Sleeping.  
Hour: 1. Remarks: Sleeping.  
Hour: 2. Remarks: Sleeping.  
Hour: 3. Remarks: Sleeping.  
Hour: 4. Temp., 96. Pulse, 64. Resp., 16. Medi-  
cine: Salts 1 dram. Liniment applied.  
Hour: 6. Remarks: Face and hands washed.  
Hour: 7. U., 1. D., 1. Medicine: Liniment ap-  
plied.  
Hour: 7:30. Remarks: Had good night.

DAY REPORT, JAN. 22, 1912.

Hour: 7:30.

Hour: 8. U., 1. D., 1. Remarks: Good stool.

Hour: 9. Remarks: Sponge bath.

Hour: 10. Medicine: Liniment applied. Linen clean.

Hour: 11. Remarks: Sister called and sit out on porch for an hour.

Hour: 12. U., 1. D., 1. Medicine: Tonic 1 dram.

Hour: 12:30. Nourishment: Light. Remarks: Patient enjoyed dinner.

Hour: 1. Medicine: Cascara 20 drops. Liniment applied to back.

Hour: 2. Remarks: Reading.

Hour: 2:30. Remarks: Sister called.

Hour: 3. Remarks: Writing.

Hour: 4. Temp., 98. Pulse, 86. Resp., 18. Nourishment: Water.

Hour: 4:30. Medicine: Liniment applied to back.

Hour: 5. Medicine: Tonic 1 dram.

Hour: 5:30. U., 1. Nourishment: Light. Remarks: Walked over hall.

Hour: 6. Medicine: Cascara 20 drops. Remarks: Reading.

Hour: 7:30. Remarks: Had good day.

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DALE SANATORIUM.  
Texarkana.

Name: Miss Hill.

Physician: Dr. Dale.

Entered: Jan. 15. Date: Jan. 22, 1912. Nurse:

Draper & Childress.

Hour: 8. Medicine: Liniment applied.  
Hour: 9. Medicine: Tonic 1 dram.  
Hour: 10. Remarks: Sleeping.  
Hour: 11. Remarks: Sleeping.  
Hour: 12. Remarks: Sleeping.  
Hour: 1.  
Hour: 2.  
Hour: 3.  
Hour: 4. Temp., 98. Pulse, 80. Resp., 18.  
Hour: 5:45. Medicine: Liniment applied.  
Hour: 7. Medicine: Tonic 1 dram. Remarks:  
Face and hands washed. Had good night.

DAY REPORT, JAN. 23, 1912.

Hour: 7:30. Nourishment: Light.  
Hour: 8. Medicine: Cascara 20 drops.  
Hour: 9. U., 1. D., 1. Medicine: Liniment applied. Sitting in chair. Linen changed.  
Hour: 10. Remarks: Writing.  
Hour: 10:30. Medicine: R. 80453 capsule.  
Hour: 11. Remarks: Hot tub bath.  
Hour: 12. D., 1. Medicine: Liniment applied.  
Remarks: Lying down.  
Hour: 12:30. Nourishment: Light.  
Hour: 1. Remarks: Patient enjoyed dinner.  
Hour: 2. Medicine: R. 80453 capsule.  
Hour: 3. Medicine: Liniment applied.  
Hour: 3:30. Remarks: Walked out on porch.  
Hour: 4. Remarks: Reading — suffering with headache.  
Hour: 4:30. Medicine: Powder.  
Hour: 5. Remarks: In parlor talking with Dr. Strong.  
Hour: 6. Temp., 97.6. Pulse, 80. Resp., 18. Medicine: R. 80453 capsule.

- Hour: 6:10. Medicine: Liniment applied.
- Hour: 7. Remarks: Feeling better; had good day.
- Hour: 7:30. Remarks: Porus plasters applied to back.

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DALE SANATORIUM.  
Texarkana

Name: Miss Hill. Physician: Dr. Dale.  
Entered: Jan. 15. Date: Jan. 23, 1912. Nurse:  
Draper & Childress.

- Hour: 8.
- Hour: 9.
- Hour: 10. Medicine: R. 80453 capsule.
- Hour: 11. Remarks: Sleeping.
- Hour: 12. Remarks: Sleeping.
- Hour: 1. Remarks: Sleeping.
- Hour: 2. Medicine: R. 80453 capsule.
- Hour: 4. Remarks: Sleeping.
- Hour: 5. Remarks: Sleeping.
- Hour: 5:30. Remarks: Sleeping.
- Hour: 6. Medicine: R. 80453 capsule.
- Hour: 7. Remarks: Face and hands washed.
- Hour: 7:30. Remarks: Had good night.

DAY REPORT, 24, '12.

Nourishment: Full.

- Hour: 7:30. Medicine: Powder.
- Hour: 8:15. Remarks: Suffering with head.
- Hour: 9. U., 1. D., 1. Medicine: R.80453 capsule.
- Hour: 10. Remarks: Resting quietly.



Hour: 11. Remarks: Dozing.  
Hour: 12. Medicine: R. 80453 capsule. Remarks:  
Sitting on porch.  
Hour: 12:30. D., 1. Nourishment: Light.  
Hour: 1. Remarks: Walking halls.  
Hour: 2. Remarks: In room.  
Hour: 3.  
Hour: 4. Remarks: Writing.  
Hour: 5. Medicine: Tonic. Nourishment: Light.  
Hour: 5:30. U., 1. D., 1. Medicine: Cascara 20  
drops.  
Hour: 6. Medicine: R. 80891 1 dram.  
Hour: 7. Remarks: Reading.

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DALE SANATORIUM.  
Texarkana

Name: Miss Hill. Physician: Dr. Dale.  
Entered: Jan. 15. Date: Jan. 24, 1912. Nurse:  
Draper & Childress.

Hour: 9. Medicine: Tonic 1 dram, R. 80491 1  
dram.  
Hour: 10. Remarks: Sleeping.  
Hour: 11. Remarks: Sleeping.  
Hour: 12. Remarks: Sleeping.  
Hour: 1. Remarks: Sleeping.  
Hour: 3. Remarks: Sleeping.  
Hour: 4. Remarks: Sleeping.  
Hour: 5.  
Hour: 6. Remarks: Face and hands washed.  
Hour: 7. Temp., 97 3-5. Pulse, 74. Resp., 18.  
Medicine: Tonic 1 dram. Remarks: Had a good  
night.

Hour: 7:30. Medicine: R. 80491 1 dram.

DAY REPORT, JAN. 25.

Nurse: Smith, Roberts & Nelson.

Hour: 7:30.

Hour: 8. Nourishment: Light. Remarks: Up walking about.

Hour: 8:30. Medicine: Cascara 20 drops. Remarks: Clean linen.

Hour: 9. U., 1. D., 1. Remarks: Lying down.

Hour: 10. Medicine: Tonic 1 dram.

Hour: 11. Nourishment: Full.

Hour: 12. Medicine: Cascara 1 dram. Remarks: Sitting in hall.

Hour: 12:30. Medicine: R. 80491 1 dram.

Hour: 1. U., 1. Nourishment: Water. Remarks: Out on porch sleeping.

Hour: 2. Medicine: R. 90491 capsule.

Hour: 3. Medicine: Tonic 1 dram.

Hour: 4. Temp., 98. Pulse, 78. Resp., 18. Nourishment: Light.

Hour: 5. Medicine: Cascara 20 drops. Remarks: On the porch reading.

Hour: 5:30.

Hour: 6. U., 1. Remarks: Patient had good day.

Hour: 7.

Hour: 7:30.

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DALE SANATORIUM.

Texarkana

Name: Miss Hill.

Physician: Dr. Dale.

Entered: Jan. 15. Date: Jan. 25, 1912. Nurse:

Draper & Childress.

Hour: 8.  
Hour: 9. Medicine: Tonic 1 dram, R. 80491 1 dram.  
Hour: 10. Remarks: Sleeping.  
Hour: 11. Remarks: Sleeping.  
Hour: 12. Remarks: Sleeping.  
Hour: 2. Remarks: Sleeping.  
Hour: 4. Remarks: Sleeping.  
Hour: 6.  
Hour: 7. Temp., 97. Pulse, 76. Resp., 18. Medicine: Tonic 1 dram, R. 80491 1 dram. Remarks: Face and hands washed.  
Hour: 7:30. Remarks: Had good day.

DAY REPORT, JAN. 26.

Hour: 7:30. Nourishment: Full.  
Hour: 8. Medicine: Cascara 20 drops.  
Hour: 9. Remarks: Sponge bath, clean linen.  
Hour: 10. Remarks: Sitting in front hall.  
Hour: 11. Medicine: R. 80491 1 dram.  
Hour: 11:20. Remarks: Out for a walk.  
Hour: 12. Medicine: Tonic 1 dram.  
Hour: 12:30. Nourishment: Full.  
Hour: 1. Medicine: Cascara 20 drops.  
Hour: 2. Medicine: R. 80891 1 dram. Remarks: Sitting in front hall.  
Hour: 3. Remarks: Gone out for a walk.  
Hour: 4.  
Hour: 5. Medicine: Tonic 1 dram, R. 80891 1 dram. Remarks: Asleep.  
Hour: 5:30. Nourishment: Full.  
Hour: 6. Medicine: Cascara 20 drops.  
Hour: 7. Remarks: Sitting in hall.  
Hour: 7:30. Remarks: Had good day.

DALE SANATORIUM.  
Texarkana

Name Miss Hill: Physician: Dr. Dale.  
Entered: Jan. 15. Date: Jan. 26, 1912. Nurse:  
Draper & Childress.

Hour: 8.

Hour: 9. Medicine: Tonic 1 dram, R. 80491 1  
dram.

Hour. 10. Remarks: Sleeping soundly.

Hour: 11. Remarks: Sleeping.

Hour: 12. Remarks: Sleeping.

Hour: 2. Remarks: Sleeping.

Hour: 4. Remarks: Sleeping.

Hour: 5.

Hour: 6. Temp., 97 2-5. Pulse, 72; Resp., 18. Medi-  
cine R. 80491 1 dram.

Hour: 7. Medicine: Tonic 1 dram. Remarks:  
Face and hands washed.

Hour: 7:30. Remarks: Had good day.

DAY REPORT, JAN. 27.

Hour: 7:30. Nourishment: Full.

Hour: 8. Medicine: Cascara 20 drops. Remarks:  
Sponge bath.

Hour: 9. Medicine: R. 80491 1 dram. Remarks:  
Clean linen.

Hour: 10. Remarks: Sitting out in front hall.

Hour: 11: U., 1. D., 1.

Hour: 12. Medicine: R. 80491 1 dram, Tonic 1 dram.

Hour: 12:30. Nourishment: Full.

Hour: 1. Medicine: Cascara 20 drops.

Hour: 2. Remarks: Gone out for a walk. Re-  
turned from walk. Sitting on porch.

Hour: 3. Medicine: R. 80491 1 dram.  
Hour: 4. Temp., 98 1-5. Pulse, 86. Resp., 18.  
Hour: 5. Medicine: Tonic 1 dram.  
Hour: 5:30. Nourishment: Full.  
Hour: 6. Medicine: Cascara 1 dram, R. 80491 1 dram.  
Hour: 7. Medicine: Douche.

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## DALE SANATORIUM

### Texarkana

Name: Miss Hill. Physician: Dr. Dale.  
Entered: Jan. 15. Date: Jan. 27, 1912. Nurse:  
Draper & Childress.

Hour: 8. Medicine: None. Remarks: Retired.  
Hour: 9. Medicine: R. 80491 1 dram, Tonic 1 dram.  
Hour: 10. Remarks: Sleeping.  
Hour: 11. Remarks: Sleeping.  
Hour: 12. Remarks: Sleeping.  
Hour: 2. Remarks: Sleeping.  
Hour: 4. Remarks: Sleeping.  
Hour: 6. Temp., 97. Pulse, 78. Resp., 18. Medicine: R. 80491 1 dram.  
Hour: 7. Medicine: Tonic 1 dram. Remarks: Face and hands washed.  
Hour: 7:30. Remarks: Had good night.

DAY REPORT, JAN. 28.

Hour: 7:30. Nourishment: Full.  
Hour: 8. U., 1. D., 1. Medicine: Cascara 20 drops. Douche.  
Hour: 9. Medicine: R. 80491 1 dram.  
Hour: 10. Remarks: Up dressing.  
Hour: 12. U., 1. Medicine: Tonic 1 dram.  
Hour: 12:30. Medicine: R. 80491 1 dram. Nourishment light.  
Hour: 1. Medicine: Cascara 20 drops.  
Hour: 2. Remarks: Sleeping.  
Hour: 3.  
Hour: 4. Temp., 98-5. Pulse, 82. Resp., 18. Medicine: R. 80491 1 dram.  
Hour: 5. Remarks: Sitting in front hall.  
Hour: 5:30. Medicine: Tonic 1 dram.  
Hour: 6. Nourishment: Full.  
Hour: 6:30. Medicine: Cascara 20 drops.  
Hour: 7. Medicine: R. 80491 1 dram.  
Hour: 7:30. Remarks Reading. Had good day.

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DALE SANATORIUM  
Texarkana

Name: Miss C. Hill. Physician: Dr. Dale.  
Entered: Jan. 15. Date: Jan. 28, 1912. Nurse:  
Draper & Childress.

Hour: 8.  
Hour: 9.  
Hour: 10. Medicine: Tonic 1 dram, R. 80491 1 dram.  
Hour: 10:30. Medicine: Liniment applied.

Hour: 11. Remarks: Sleeping soundly.  
Hour: 12. Remarks: Sleeping.  
Hour: 2. Remarks: Sleeping.  
Hour: 4. Remarks: Sleeping.  
Hour: 5. Remarks: Sleeping.  
Hour: 6. Temp., 97 1-5. Pulse, 78. Resp., 18.  
Medicine R. 80491 1 dram.  
Hour: 7. Medicine Tonic 1 dram. Remarks: Face  
and hands washed.  
Hour: 7:30. Remarks: Had good night.

DAY REPORT, JANUARY 29.

Nurse: Smith & Nelson.

Hour: 7:30. Nourishment: Full.  
Hour: 8.  
Hour: 9. U., 1. D., 1. Medicine: Douche: Re-  
marks: Clean linen.  
Hour: 10. Medicine: Cascara 20 drops, R. 80491  
1 dram. Remarks: Sponge bath.  
Hour: 11. Remarks: Sitting in front halls.  
Hour: 12.  
Hour: 12:30. Medicine: Tonic: 1 dram. Nourish-  
ment light. Remarks: Walking about halls.  
Hour: 1. Medicine: Cascara 20 drops.  
Hour: 1:30. Remarks: Leaving for walk.  
Hour: 2:45. Returned; sitting in front hall.  
Hour: 3. Remarks: Sitting in front hall.  
Hour: 4. Temp., 98. Pulse, 78. Resp., 18. Medi-  
cine R. 80491 1 dram.  
Hour: 5. Medicine: Tonic 1 dram.  
Hour: 5:30. Nourishment: Full.  
Hour: 6. Remarks: Talking over phone.  
Hour: 7.  
Hour: 7:30. Remarks: Had good day.

DALE SANATORIUM  
Texarkana.

Name: Miss C. Hill. Physician: Dr. Dale.  
Entered: Jan. 15. Date: Jan. 30, 1912. Nurse:  
Draper & Childress.

Hour: 8. Remarks: Nauseated.  
Hour: 9. Medicine: Tonic: 1 dram.  
Hour: 10. Medicine: R. 80491 1 dram. Remarks:  
Asleep.  
Hour: 11. Remarks: Asleep.  
Hour: 12. Remarks: Asleep.  
Hour: 1. Asleep or very quiet.  
Hour: 2. Remarks: Asleep.  
Hour: 3.  
Hour: 4.  
Hour: 5.  
Hour: 6. Medicine: R. 80491 1 dram.  
Hour: 7. Temp., 97. Pulse, 84. Resp., 16. Medi-  
cine: Tonic 1 dram. Remarks: Face and hands  
washed. Had good night.  
Hour: 7:30.

DAY REPORT JANUARY 30, 1912.

Nourishment: Full.

Hour: 7:30. Medicine: Douche.  
Hour: 8. Medicine: Cascara 20 drops. R. 80491  
1 dram. Remarks: Sponge bath.  
Hour: 9. Remarks: Mother and sister called.  
Patient feeling fine.  
Hour: 10.  
Hour: 11.  
Hour: 12. Medicine: Tonic 1 dram, R. 80491 1  
dram.



Hour: 12:30. Nourishment: Light.  
Hour: 1. Medicine: Cascara 20 drops.  
Hour: 2. Remarks: Gone out for walk; still in town.  
Hour: 3.  
Hour: 4. Temp., 98. Pulse, 80. Resp., 18. Medicine R. 80491 1 dram.  
Hour: 5. Medicine: Tonic 1 dram.  
Hour: 5:30. Nourishment: Light.  
Hour: 6. Medicine: R. 80491 1 dram.  
Hour: 7. Remarks: Getting ready for bed.  
Hour: 7:30. Remarks: Had good day.

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DALE SANATORIUM  
Texarkana.

Name: Miss C. Hill. Physician: Dr. Dale.  
Entered: Jan. 15. Date: Jan. 30, 1912. Nurse:  
Draper & Childress.

Hour: 8. Medicine: R. 80491 1 dram. Remarks:  
Feeling tired in chest.  
Hour: 9. Medicine: Tonic 1 dram. Remarks:  
Sitting up in chair.  
Hour: 10. Remarks: Propped up in bed.  
Hour: 11.  
Hour: 12. Remarks: Sleeping.  
Hour: 1. Remarks: Sleeping.  
Hour: 2. Remarks: Sleeping.  
Hour: 3. Remarks: Asleep or very quiet.  
Hour: 4. Remarks: Awake.  
Hour: 5. Temp. 97. Pulse: 78. Resp.: 16.  
Hour: 6.  
Hour: 7. Remarks: Dressing. Dismissed.

Austin Theological Seminary  
Robert E. Vinson  
President  
Austin, Texas

June 6, 1913.

Messrs Cobbs, Eskridge & Cobbs,  
Attorneys at Law,  
San Antonio, Texas.  
Gentlemen:—

In response to a letter from Dr. J. R. Dale of Texarkana, I am enclosing you herewith affidavit of character made and sworn to by me. If this is not sufficient for the purpose of helping to prove Dr. Dale's character, I shall be glad to sign and swear to any statement necessary to substantiate that fact.

I am,

Very sincerely yours,

ROBERT E. VINSON,  
President.

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The State of Texas  
County of Travis.

Before me the undersigned authority on this day personally R. E. Vinson, who after being by me duly sworn, on his oath deposes and says:

That I am a citizen of Travis County, Texas; that I am president of the Austin Presbyterian Theological Seminary, and have been connected with said institution for many years;

That I am personally acquainted with Dr. J. R. Dale who resides in Texarkana, Texas; that I have been associated with him at different times for the past seven years; that I have frequently stopped at his home, being his guest for a week at a time; that

I know him to be a gentleman of the highest and best type, that he is a man of unquestioned integrity, and I regard him as one of the best and among the most substantial citizens of Texas; that I have known and know now many men in Texas and elsewhere, and I can say that Dr. Dale can be placed side by side with the good men of the country, for he is one in every sense of the word.

I know him to be a man whose moral character is founded upon religious convictions; that his present life is the fruit of many years of careful training in a Christian home.

R. E. VINSON,  
Affiant.

Sworn and subscribed to before me this the 5th day of June, A. D. 1913.

LYNN SMITH,  
Notary Public, Travis County, Texas.

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The State of Texas  
County of Bowie

BEFORE ME, the undersigned authority, on this day personally appeared John J. King who after being duly sworn deposes and says:

That he is well acquainted with Dr. J. R. Dale and has personally known of him for nearly twenty years; that Dr. Dale has resided in Texarkana about twelve years but formerly resided at Arkadelphia, Arkansas; that he is considered one of the greatest surgeons and physicians in this section of the country and has commanded and does now command a very extensive practice; that prior to his removal

to Texarkana, people for many miles around, principally ladies, went to Arkadelphia to place themselves under his treatment, and since his removal to Texarkana, his practice has continued and has grown.

As a man, he is the embodiment of morality and upright living and no man in the community stands any higher in the confidence and esteem of the people who know him. There is probably no man in our community who has done more and made more sacrifices for suffering humanity than Dr. Dale. His practice has been confined mostly to the ailments of women and through his great skill and untiring work, he has brought relief to many hundreds. Any intimation that he had at any time failed to treat any patient with proper respect is unbelievable by every one who knows him.

JNO. J. KING,

SUBSCRIBED and sworn to before me this the 27th day of May A. D. 1913.

CATHERINE O'TOOLE.

Notary Public, Bowie County, Texas.

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The State of Texas  
County of Bowie

To Whom It May Concern:

I can say that I know well and intimately Dr. J. R. Dale and his family. He was the favorite physician of both my father and my mother for many years. I consider him now as easily the most distinguished and successful physician in this section of the country.

I am not acquainted with anyone in the medical profession whose business is larger or more lucrative, whose social and professional standing in his home community is higher or whose character and behavior comes nearer being beyond reproach than his.

He is an elder in the Presbyterian Church. He is a useful and public spirited citizen and is as clean and fine a man as I have ever known. I had as soon suspect any man of my acquaintance of unprofessional or dishonorable conduct as to suspect him.

W. L. ESTES.

SUBSCRIBED and sworn to before me this the 31st day of May A. D. 1913.

CATHERINE O'TOOLE,  
Notary Public, Bowie County, Texas.

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The State of Texas  
County of Bowie

BEFORE ME, the undersigned authority, on this day personally appeared W. R. Grim who after being duly sworn deposes and says:

That he is well acquainted with Dr. J. R. Dale and has personally known him for nearly twenty years; that he is considered one of the greatest surgeons and physicians in this section of the country and commands a very extensive practice; that people for many miles around him go to his sanitarium to place themselves under his treatment and among whom are many ladies.

As a man, he is the embodiment of morality and upright living and no man in the community stands any higher in the confidence and esteem of the peo-

ple who know him. There is probably no man in our community who has done more or made more sacrifices for suffering humanity than Dr. Dale. His practice has been and still is very extensive in the treatment of women and none hesitate to place themselves in his care. Any intimation that he had at any time failed to treat any patient with proper respect is unbelievable by everyone who knows him.

W. R. GRIM.

SUBSCRIBED and sworn to before me this the 27th day of May A. D. 1913.

CATHERINE O'TOOLE,  
Notary Public, Bowie County, Texas.

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The State of Arkansas  
County of Miller

BEFORE ME, the undersigned authority, on this day personally appeared Dr. J. A. Lightfoot and Dr. R. H. T. Mann, both of whom, after being dully sworn, depose and say:

That they and each of them are well acquainted with Dr. J. R. Dale of Texarkana, Arkansas, and have known him for nearly twenty years; that as a physician and surgeon, he is considered one of the greatest in this section of the country and as a gentleman, he is above reproach; that there are few physicians and surgeons anywhere who have had more ladies and girls under his care and treatment than Dr. Dale, and there has never heretofore been a breath of suspicion of disrespect shown by him to any patient, and it is unbelievable by all who know him that he would be guilty of any conduct unbe-

coming a gentleman and his high profession.

He is considered the very embodiment of morality and upright Christian citizenship, and we do not believe there is anyone in this section of the country who would not be glad to so testify.

R. H. T. MANN.

JNO. A. LIGHTFOOT, M. D.

SUBSCRIBED and sworn to before me this the 27th day of May A. D. 1913.

WILL STEEL,

Notary Public, Miller County, Arkansas.

My commission expires May 29th, 1915.

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The State of Texas  
County of Bowie

BEFORE ME, the undersigned authority, on this day personally appeared W. E. Casey, who, after being duly sworn, says:

That he has been a citizen of Texarkana for nearly thirty years and for sixteen years was a peace officer in said city, ten years of which time he was city marshal. That he is well acquainted with John J. King, W. L. Estes, W. R. Grim, Dr. J. A. Lightfoot and Dr. R. H. T. Mann, and that each and all of them are old citizens of this place and men of high standing; that John J. King and W. L. Estes are prominent attorneys of this place; that W. R. Grim is president of the Texarkana National Bank, and that Dr. J. A. Lightfoot and R. H. T. Mann are physicians of high standing, enjoying a large and lucrative practice.

That he is also well acquainted with Dr. J. R. Dale,

having known him for about seventeen years. That he stands at the head of his profession as a physician and surgeon and is a man of unimpeachable character. That he probably has the largest practice of any surgeon in this section of the country and his sanitarium is filled most of the time with ladies and girls who come from the country around Texarkana for treatment by him. That no man stands higher for moral and Christian character and as a benefactor to the unfortunate than Dr. Dale.

W. E. CASEY.

SUBSCRIBED and sworn to before me this the 31st day of May, A. D. 1913.

CATHERINE O'TOOLE,  
Notary Public, Bowie County, Texas.

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E. D. THOMAS,  
Jeweler and Optician.

San Antonio, Texas, May 16th, 1913.  
Messrs. Cobbs & Eskridge,  
City.

Dear Sirs:

After we had found our verdict in the case of Miss Hill vs. the railroad, in her favor, the jury handed the foreman an expression to the effect: "That we the jurors feel that any evidence developed during the trial should not reflect upon the good moral character and reputation of Dr. Dale." This was no part of our verdict but we felt that the Court and those interested in the case, and particularly Dr. Dale, should know how the jury felt in regard to the testimony that was offered reflecting upon his character. We know that the procedure is unusual but we felt that some good could be accomplished and



that the damage to some extent may be impaired. The writer does not know why the foreman made no effort to have the Court announce an agreed upon expression of confidence in the good character of your witness, Dr. Dale, and he writes this that you may take such steps as you deem proper to have announced our unimpaired confidence in the righteous character of this man.

Yours very respectfully,

EDT-T

E. D. THOMAS.

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Seguin, Texas, June 4, 1913.

The State of Texas,  
County of Gaudalupe.

Before me the undersigned authority, on this day personally appeared H. A. Kypfer, who, deposes and says: That he was a member of the jury which tried the case of Clara Hill vs. T. & P. Ry. Co. in the Federal Court at San Antonio, Texas, during the May term of Court. That after the case had been submitted to the jury and they had retired to consider their verdict, one of the jurors E. D. Thomas took from his pocket a sheet of paper containing some typewritten questions about the case, and said I have this made up so as to assist us. Mr. O. E. Lacy was sitting near and told him we had the Judge's charge to go by and could not consider them.

In regards to the testimony of Miss Hill concerning Dr. Dale's insulting treatment in his sanitarium at Texarkana, I can truthfully state that this fact influenced and prejudiced me in arriving at a verdict, and the Letter from Mr. Thomas to Messrs. Cobbs & Eskridge in which he states "That we the jury feel

that any evidence developed during the trial should not reflect upon the good moral character and reputation of Dr. Dale'' I will further state that I did not approve of this expression, but did oppose it, and do not understand why Mr. Thomas still holds that we all agreed to this.

H. A. KYPFER.

Sworn to and subscribed to before me, this the 4th day of June, A. D., 1913.

J. P. GIBBS,

(Seal) Notary Public, Gaudalupe Co., Texas.

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The State of Texas,  
County of Medina.

Before me, the undersigned authority, on this day personally appeared O. E. Lacy, who, after being duly sworn deposes and says: That affiant was a member of the jury which tried the case of Clara Hill vs. T. & P. Ry. Co. in the Federal Court at San Antonio, Texas, during the May, 1913, Term; that after the case had been submitted to the jury and they had retired to consider their verdict, one of the jurors, E. D. Thomas, took from his pocket a sheet of paper containing a lot of typewritten questions about the case and submitted them to the jury or a part of them for consideration, but affiant immediately told him that the same could not be considered, that they had the Court's charge to go by, and that it would be improper to consider these matters. I know that they were not the papers submitted to us by the Court.

O. E. LACY.

Sworn to and subscribed before me, this the 27th day of May, A. D., 1913.

(Seal)

GEO. W. JONES,  
Notary Public, Medina Co., Texas.

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STATEMENT OF MR. O. E. LACY.

Hondo, Texas, May 26, 1913.

Mr. O. E. Lacy states as follows:

I was on jury in United States Court at San Antonio in the case of Clara Hill vs. T. & P. Ry. Co. et al.

Referring to letter from Mr. E. D. Thomas addressed to Messrs. Cobbs & Eskridge wherein he states that the jury handed the foreman an expression to the effect: "That we the jurors feel that any evidence developed during the trial should not reflect upon the good moral character and reputation of Dr. Dale"

Mr. Thomas was the author of this statement, and fathered it, but I was opposed to it at all times, saying it was not for the jury to decide such things, and requested the foreman of the jury to destroy it, which I suppose he did.

I did not sign the statement referred to and did not see any one else sign same.

O. E. LACY.

Sworn to and subscribed before me, this the 27th day of May, A. D., 1913.

(Seal)

A. M. LAMM,  
Justice of the Peace and Ex-Officio Notary Public in  
and for Medina Co., Texas.

San Marcos, Texas, May 25, 1913.

Mr. Adolph Wilson states as follows: I was juror on case of Clara Hill vs. T. & P. et al. in United States Court at San Antonio and rendered my verdict on the law and evidence as near as possible. In regards to Miss Hill's testimony about Dr. Dale of Texarkana. As I believed all she testified to and had no reason not to, I believe she was insulted by Dr. Dale in his sanitarium, and as Dr. Dale did not impress me to the contrary Miss Hill's testimony regarding his treatment influenced me in my verdict as much as any part of evidence on record.

ADOLPH WILSON.

Sworn and subscribed before the Adolph Ziegenhals, a notary public for Guadalupe Co., Texas, this 25th day of May, A. D., 1913.

(Seal)

ADOLPH ZIEGENHALS,

Notary Public for Guadalupe Co., Texas.

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Pebbe, Texas, June 1, '13.

Mr. Oliver Rose states:

I was a member of the jury which tried the case of Clara Hill vs. T. & P. in Federal Court at San Antonio, May, 1913. After the jury had retired to consider their verdict one of the jurors, E. D. Thomas, took from his pocket a sheet of paper containing some typewritten questions about the case. He said I have this paper outlining the case so we wont be so long. I do not know what became of this paper. I heard Mr. Lacy say we had the Judge's charge to use. I am not certain to whom he was speaking.

In regards to Miss Hill's testimony about Dr. Dale's insulting treatment towards her in his sanitarium I will state that this fact prejudiced me and influenced me more in rendering my verdict than any other one thing and I belive it would prejudice any other man.

OLIVER ROSE.

Witness:

E. J. HILGERS.

W. T. LEANELL.

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Pebble, Texas, June 1, 1913.

Mr. James Crider states:

I was a member of the jury which tried the case of Clara Hill vs. T. & P. Ry. in Federal Court at San Antonio, May, 1913. After the jury had retired to consider their verdict, one of them E. D. Thomas took from his pocket a sheet of paper containing some typewritten questions about the case. He said I have some data outlining the case which will help us to work faster, and I think read part of it to the jury. I can not say what became of this paper as I did not pay any more attention. In regards to Miss Hill's testimony concerning Dr. Dale's conduct in his sanitarium, I will state that this one fact prejudiced me and influenced me more in rendering my verdict than any other one thing.

JAMES CRIDER.

Witness:

W. T. LEANELL.

E. J. HILGERS.

State of Texas,  
County of Bexar.

Before me, the undersigned authority, on this day appeared E. J. Hilgers, who after being duly and legally sworn doth depose and say that he is the E. J. Hilgers whose name appears as a witness with that of W. T. Leanell to the several statements of Oliver Rose and James Crider. That he saw each of the parties named sign their names to the attached statement, each in the presence of himself and of each one of the witness thereon named.

That the said paper was written on the 1st day of June being Sunday, the said parties residing in the country and there being present at that time no Notary Public nor one accessible to take the oath of said parties to the said instrument.

E. J. HILGERS.

Sworn to and subscribed before me this the 3rd day of June, 1913.

(Seal)

S. D. HOPKINS,  
Notary Public, Bexar County, Texas.

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#### STATEMENT OF E. D. THOMAS.

In regard to the case of Clara Hill against the Texas & Pacific Railway, recently tried in the Federal Court in San Antonio, Texas, I make the following statement:

I am in the jewelry business on Commerce Street in the City of San Antonio, and have resided in San Antonio for twenty-five years. I was one of the jurors sitting in the trial of the Clara Hill case, and after the case was given to the jury, and when the

jury had retired to the jury room, I stated to the jurors in the jury room that I had noted and written down what I thought were the leading issues in the case to be decided by us, and I suggested that I thought it would aid the jury in its deliberations to take up and consider the issues with some system rather than to immediately decide either for plaintiff or defendant. The issues, as I had noted them and suggested them for the consideration of the jury, were about as follows:

(1) Was Miss Hill in health according to the evidence when she left her home December 22nd, 1911.

(2) If so, at what time was her ill health or injury first evident?

(3) To what was her ill health or injury to be attributed?

(4) If we agree that it was due to the railroad accident or collision in question, how much damages should she be awarded, if any?

When I made this suggestion, that we consider the issues this way, one of the jurors suggested that we had the Court's charge, and that we had better take the Court's charge and first carefully read and consider it. The charge of the Court and the special charges were then carefully read and considered by the jury, and then we took a vote upon whether the plaintiff was in good health when she left home, and all of the jurors voted in the affirmative.

As I now recollect it, we next took a vote to determine at what time plaintiff's ill health or injury was first evident, and all of the jurors voted that it was immediately following the railway collision.

We next voted to determine to what her ill health or injury was to be attributed, and all of the jurors was immediately following the railway collision.

After that, we reached the question of how much

damages the plaintiff was entitled to and there was some discussion among the jurors as to the amount of plaintiff's wages, and when that was decided there was very little difference between any of the jurors as to the amount of compensation that should be awarded the plaintiff. After a little discussion and talking, all of the jurors agreed on the amount of the verdict, and we requested the verdict to be written out, which the foreman signed and we all agreed to it.

Up to the time that the verdict was agreed to and written out there was nothing said about Dr. Dale or plaintiff's testimony in reference to Dr. Dale, but after the verdict was written out and signed, I suggested that I didn't think the testimony should reflect on the moral character of Dr. Dale, and that I thought it would be proper for the jury to make an expression to this effect in writing and to let this expression accompany our verdict. To this suggestion coming from me there was no dissent, but all of the jurors seemed to agree to it, and I was requested by some of the jurors to write out this expression, which I did. I sat at the table in the jury room and wrote out an expression to the effect that we, the jurors, did not feel that the testimony should reflect on the moral character of Dr. Dale, and I read this expression to the jury, and all seemed to concur. Some one expressed a doubt whether or not we ought to hand in this expression along with our verdict, but no one expressed any dissent from the expression. I handed the expression as I had written it out to the foreman, and thought he would hand it in at the time the verdict was returned. I did not learn until afterwards that it was not turned in, and I do not know why it was not turned in. I suppose the foreman kept it. All of this in regard to the jury making an



expression in regard to Dr. Dale occurred after the verdict had been agreed upon, and had been written out and signed by the foreman, and it was intended only to be an expression on the part of the jury showing how they felt in regard Dr. Dale. Personally I did not not feel that Dr. Dale had any improper motive in taking any liberty with the plaintiff, and that if he did put his arm around her, it was to soothe and quiet her as he stated, and I thought it nothing more than right that the jury should make an expression to this effect. No one differed with me in the view I expressed, but all seemed to concur therein.

There was nothing considered or discussed in the jury room except the evidence as we had it from the witnesses, and there was very little difference between the jurors on the amount of damages they thought ought to be awarded. We discussed the plaintiff's injuries and after a little discussion, we all agreed on the amount as shown by the verdict. No juror expressed any hostility to or prejudice against Dr. Dale, and there was nothing whatever said in the jury room about the testimony in regard to Dr. Dale until after the verdict had been agreed upon, and had been written out, and signed by the foreman. We considered the evidence in regard to plaintiff's injuries, and upon this we based the amount of our verdict.

Signed at San Antonio, Texas, this 24th day of June, 1913.

E. D. THOMAS.

Subscribed and sworn to before me, this 24th day of June, 1913.

(Seal)

WM. S. HOWELL, JR.,

Notary Public, for Bexar County, Texas.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and Texas  
& Pacific Ry. Co.

Defendants Bill of Exception No. 11. Refusal  
to Postpone, Continue or Grant New Trial.

Filed October 14, 1913. D. H. Hart, Clerk.

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PETITION FOR WRIT OF ERROR.

The United States District Court, Western District  
of Texas, At San Antonio, Texas.

Clara Hill

vs.

No. 182.—*Law.*

I. & G. N. Railway Co. and Texas & Pacific Ry. Co.

*To the Honorable Judge of Said Court:*

The Texas & Pacific Railway Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury, and the judgment entered on the 16th day of May, 1913, comes now by its attorneys, whose names are signed hereto, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security that the defendant shall give and furnish upon said writ of error.

W. T. ARMISTEAD,

COBBS, ESKRIDGE & COBBS,

Attorneys for Defendant.

Allowed this 15th day of May, A. D., 1913.

T. S. MAXEY,  
United States District Judge.

Endorsed: No. 182 Law.  
Clara Hill vs. I. & G. N. Railway Co. and Texas &  
Pacific Railway Co.  
Petition for Writ of Error.  
Filed July 15, 1913. D. H. Hart, Clerk.

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### ASSIGNMENTS OF ERROR.

The United States District Court, Western District  
of Texas, San Antonio Division.

Clara Hill  
vs. No. 182—*Law*.  
The I. & G. N. Ry. Company and the T. & P. Ry. Co.

Now comes the defendant, The Texas & Pacific  
Railway Company, against whom the judgment was  
secured in favor of the plaintiff in the above styled  
and numbered cause, and files the following assign-  
ments of error as grounds for reversal of the judg-  
ment of the District Court rendered in this case:

### FIRST ASSIGNMENT OF ERROR.

The Court erred in not sustaining the several pleas  
in writing of the defendants, which pleas are set forth  
in the pleading of defendants, and which were over-  
ruled by the Court, as recited in the judgment of  
the Court, and as further shown by Bill of Excep-  
tion No. 1 herein, to the effect that the suit was orig-

inally and improperly brought in Frio county against the Texas & Pacific Railway Company because it had its domicile in the northern district of Texas, in Dallas County, Texas, having no railroad or local agent in Frio county, its co-defendant having a railroad and local agent in Frio county, but had its residence and domicile in Harris County, Texas, because the I. & G. N. Ry. Co. so having its local agent in said county did not justify the plaintiff to file its suit in said county against the Texas & Pacific Ry. Co., which said company was alleged to have committed a tort and injury to the plaintiff upon the line of its railway, and there is no valid law that would justify the institution of said suit against the T. & P. Ry. Co., and to hold it in said Frio county, and the District Court having the same power to pass upon said question of jurisdiction upon the said proper plea being filed, raising the same, and the privilege of said defendant to be so sued in its own district, was error in the Court in not sustaining, and dismissing the same, there being no valid law in Texas justifying such action.

## SECOND ASSIGNMENT OF ERROR.

The Court erred in excusing the jurors J. M. Vance and J. G. Lentz, because they stated they were opposed to "fake damage suit litigation," and thereby prejudiced to that extent, but that they were not opposed to legitimate cases, and said Vance and Lentz both being business men in San Antonio, and qualified jurors in every respect, and their statements as shown by Bill of Exception No. 2 does not render them incompetent jurors, the evidence showing that the jurors who tried said cause also were further prejudiced by certain facts developed in said cause,

as shown in the affidavits attached to Bill of Exception No. 11 upon the refusal of the Court to cut down said judgment or to grant a postponement thereof, as is likewise set out in Bill of Exception No. 3 on the application to postpone said cause, the said jurors, or some of them, who tried said cause were influenced and prejudiced, which might not have occurred if jurors of the character and stamina of said Vance and Lentz had been permitted to remain on said jury, they not having disqualified themselves, and it was error in the Court below to so hold, because they were opposed to "fake damage suit litigation."

### THIRD ASSIGNMENT OF ERROR.

The Court erred in refusing to postpone the case to give the defendants an opportunity to meet the charge against Dr. Dale, one of the leading witnesses for defendants, against whom it was testified by Clara Hill, the plaintiff, that Dr. Dale had been guilty of improper conduct towards her while she was in the institution, which testimony being so prejudicial against defendants that defendants should have been allowed time to secure witnesses to contradict Clara Hill, and to sustain the good character and good name of said Dr. Hale, and to show by the witnesses as was shown and set out in Bill of Exception No. 11 referred to as a part of this, that Dr. Dale was a man of irreproachable character, and that no opportunity for anything of the kind could happen, because the nurses were always present when he attended to patients, and said testimony could have no other effect than a prejudicial one against defendants, and if an objection to the admissibility of such testimony had been made thereto,

whether sustained or not, would carry with it to the mind of the jury inferences that could not have been met by direct testimony, and no action of the Court in sustaining such an objection, or instructing the jury not to consider the same would have removed its prejudicial effect, it being one of those cases where an absolute contradiction could have been of no beneficial effect, and it was a matter of discretion wholly in the Court as to whether or not a postponement should have been given, the said Court lasting from May to and into July, and would have involved in all probability the continuance of not more than one or two days to procure such testimony. That the refusal of the Court, as shown by the testimony in Bill of Exception No. 11, and purpose of such continuance being set out by a motion in writing in Bill of Exception No. 3, the Court exercised a harsh and injurious discretion against the defendants, as shown by the size of the verdict, to-wit, \$21,500.00. All of said testimony would have gone, and did go to the weight and credibility of plaintiff's testimony, there being a sharp conflict between the plaintiff and other witnesses, especially Dr. Dale and Dr. Strawn, physicians who attended to her immediately after the alleged accident, it being shown by said witnesses that she was, and would have recovered if she had remained under his, or some other like proper treatment. (See Bills of Exceptions Nos. 3 and 11.)

#### FOURTH ASSIGNMENT OF ERROR.

The Court erred in refusing to charge the jury peremptorily to find for the defendants, as requested by them in Charge No. 1, Bill of Exception No. 5, which is as follows:

“You are instructed that under the evidence you

will find a verdict for the defendant (Texas & Pacific Ry. Co.) because such injuries as plaintiff sues for could not be, and were not the direct and proximate cause of the collision and shock, if any, to plaintiff."

#### FIFTH ASSIGNMENT OF ERROR.

The Court erred in the first paragraph of its instructions, as follows:

"In this case I charge you that the evidence has not developed any liability on the part of the defendant, International & Great Northern Railway Company, and I therefore charge you that you must return a verdict for this company, and proceed to consider the case against the Texas & Pacific Railway Company, under the following instructions."

#### SIXTH ASSIGNMENT OF ERROR.

The Court erred in its general charge, as follows:

"If you believe from the evidence that the plaintiff directly received any of the injuries alleged in her petition by reason of said collision, then I charge you that your verdict must be for the plaintiff in such a sum as will fairly compensate her for any such injuries as were received and as set forth and claimed by her in her petition; and in assessing damages you should take into consideration the reasonable expenses which the plaintiff has incurred for drugs, hospital services, and medical and surgical treatment, which you may find were reasonably necessary in the proper treatment of any injuries which you may find she received. In estimating such damages, you will also take into consideration the mental and physical suffering, if any, which the



plaintiff has undergone by reason of any such injuries; and if you find that any such injuries are permanent, you should also consider any mental and physical suffering which any such injuries will produce upon plaintiff in the future. And if you find that any such injuries are permanent, and that they will diminish the plaintiff's capacity to labor and earn money in the future, then I charge you that this element of damages also should be considered."

#### SEVENTH ASSIGNMENT OF ERROR.

The Court erred in that portion of its charge, as follows:

"In this case the defendants charge that the operation and removal of the plaintiff's ovaries was unnecessary, and that the surgeon who performed said operation was guilty of mal-practice. In this connection I charge you that the plaintiff would not be responsible for the errors or mistakes of the surgeon who performed the operation, provided she used ordinary care in the selection of a reasonably competent surgeon, and did select a reasonably competent surgeon, and submitted her case to his judgment. If you find from the evidence that the plaintiff received hurts in said collision which led to the injury and impairment of her ovaries, and if you further find that she used ordinary care in the selection of a reasonably competent surgeon, that is, such care as a person of ordinary prudence would have exercised under similar circumstances, and did employ a reasonably competent surgeon to perform said operation, and that he, acting upon his judgment, removed her ovaries, then I charge you that the defendant would be liable for the condition produced by reason of said ovaries being removed, notwith-



standing some other course pursued by the surgeon might have saved the removal of her ovaries."

#### EIGHTH ASSIGNMENT OF ERROR.

The Court erred in submitting to the jury the question as to whether or not the plaintiff received hurts in said collision which led to the injury and impairment of the ovaries, without instructing the jury that such injuries could only result from causes alleged by plaintiff to come from a shock or concussion, and again has made her right to recover depend upon the selection of a person of ordinary care and prudence to perform the operation, whether it was required or not; and makes the case depend upon whether or not the surgeon who performed the operation was justified or not in performing same would entitle her to recover, notwithstanding some other course pursued by the surgeon might have saved the removal of her ovaries.

#### NINTH ASSIGNMENT OF ERROR.

The Court further erred because in the general charge it did not submit all the issues in said cause, and especially the defenses asserted and presented by defendants in their answer, all of which exceptions to the general charge of the Court, above enumerated, were noted at the time, and preserved in Bill of Exception No. 4.

#### TENTH ASSIGNMENT OF ERROR.

The further errors in the General Charge of the Court was instructing the jury that the plaintiff would not be responsible *for the errors and mistakes*

*of the surgeon who performed the operation, provided she used ordinary care in the selection of a reasonable competent surgeon.*

Our contention in this connection being:

(a) Whether the particular operation was necessary was an issue for the jury, on defendant's proof, to determine and the Court should have submitted to the jury, whether or not *she* used proper care in first ascertaining, by making preparation for the restoration of her health, before selecting any surgeon to perform any such operation:

(b) Whether her condition required the operation:

(c) Whether the operation eventually was made by a doctor who removed more of the plaintiff's organs than were necessary, to restore her health:

(d) Whether she received the injury, if any, on the train, which was or was not, such as to cause the condition, stated, by the surgeon, who performed the operation, the plaintiff having alleged she received a *severe shock and concussion* and by reason thereof, her nervous system was severely shocked and injured and impaired, and did not then claim to be injured. It is nowhere alleged that she *was hurt* on account of the collision or that she received hurts in said collision, and the only injuries she received, pleaded by her, were injuries received from "*shock and concussion*" and not by any other injury that *hurt her*. The Court's attention was called specifically to the failure of plaintiff to allege any hurt or injury other than was occasioned by a severe shock, and it was upon this petition that the case was tried, and the Court erred in submitting any other injury than alleged for the consideration of the jury.

(e) And the Court erred in making, as the Court did, the plaintiff's cause of action on account of the

operation and her recovery therefor, depend as to whether she employed "a reasonably competent surgeon to perform said operation." Refused to submit any issue as to whether she ought to have used ordinary care in relieving herself from such injuries before going under the surgeon's knife, or using ordinary care in avoiding an operation, *rather than her right to recover for the injuries done her, if she did employ "a reasonably competent surgeon to perform said operation,"* and not leaving for the jury to say whether she ought to have been operated upon or not.

(f) The Court refused to submit in its General Charge to the jury, defendant's defense that she was induced to submit to the operation, whether necessary or not, or if the operation was wholly unnecessary, or whether it was on account of plaintiff's condition prior to the time when the operation was made upon her.

(g) That the plaintiff had gotten well and recovered from the effects of the injury and that the operation upon her was not the direct and immediate result of the injury caused by the "shock or the concussion" in the alleged accident, but was on account of her own carelessness and want of care in allowing the said operation to take place, which was the proximate cause of the loss of her ovaries.

#### ELEVENTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 2 set out in Bill of Exception No. 6, requested by the defendants, as follows:

"If under the instructions herein given you, you find for the defendant, the International & Great Northern Railway Company, I further charge you that you cannot find for the plaintiff against the

Texas & Pacific Railway Company, and you will so find.”

#### TWELFTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 3 set out in Bill of Exception No. 8, requested by the defendants, as follows:

“Defendants request the court to charge the jury that if they believe the train upon which plaintiff claims to have been hurt, did get off the track or rather run into a switch on a side track unexpectedly, as the switch was set for the side track instead of the main line by some party unknown to the defendant and without any fault or negligence on its part, then you will find for the defendant.”

#### THIRTEENTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 5 set out in Bill of Exception No. 7, requested by the defendants, as follows:

“If you believe from the evidence that the plaintiff had the operation performed, as alleged on account of hurts received in the accident, you cannot consider any injury that came to her from the same unless it came as a result from the shock received in said train or from concussion, there being no allegation in plaintiff’s pleading that the injury was received in any other way; and in considering the injuries received from them or from the collision, you will disregard every element of injury that could flow entirely from traumatism, that is, a blow of some kind.”

#### FOURTEENTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 6 set out in Bill of Exception No. 9, requested by the defendants, as follows:

“If you believe that the plaintiff’s condition as alleged by her, was brought about by reason of her prior condition and her acts and conduct thereafter, and any injuries resulting from the operation, and the others would not have occurred except for the result of her own negligence in having said operation performed, as no person of ordinary care and prudence would have undergone, and notwithstanding the alleged act of negligence upon the part of the railroad, the present injuries are the direct and immediate result of said act, following in natural and unbroken sequence, and the railroad company was not guilty of any negligence resulting from her alleged injuries which were the proximate result of her said accident in the defendant’s trains of cars, but was on account of her own carelessness and want of care in allowing said operation to take place, which was the proximate cause of her injuries, you will find for the defendant.”

#### FIFTEENTH ASSIGNMENT OF ERROR.

The Court erred in refusing to give Special Charge No. 9 set out in Bill of Exception No. 10, requested by the defendants, as follows:

“You are instructed that if you believe from the evidence that at the time the plaintiff was operated upon that she was a neurasthenic and was suffering from neurasthenia, and that she was influenced to submit herself to the surgical operation when it was not necessary and when other treatment would have

entirely cured and relieved her, and that she did not use and exercise ordinary care, and such want of care, if you believe she did not exercise proper care, caused her to select a doctor when it was not necessary, and that her act contributed to the injury, then the railroad company would not be responsible in damages for the consequences of the operation that was performed upon her; and you will in summing up the amount of damages you find she was entitled to, if any, not consider the operation upon her and the removal of any other organs in finding a judgment and assessing damages against the defendant, but will only assess such damages as arose from the injury otherwise than as hereinabove instructed."

#### SIXTEENTH ASSIGNMENT OF ERROR.

The said verdict was excessive, and outrageously high, and shows that the same was the result of prejudice.

#### SEVENTEENTH ASSIGNMENT OF ERROR.

The Court erred in refusing to grant the defendant a postponement or continuance, and to cut down the said excessive verdict, as shown by Bill of Exception No. 11, which Bill of Exception No. 11 was asked to be considered in connection with the third Assignment of Error, and third Bill of Exception, because the Court had it in its power to remedy the wrong by either granting a new trial, as it was requested or a postponement of the case because the evidence showed from the affidavits of the nurses, Kathleen Childress, Miss Nelson and Miss Ester, and their reports of the condition of Miss Clara Hill, plaintiff, while she was in said hospital, and by the affidavits

of the other witnesses, that Dr. Dale was a man of irreproachable character, and it was impossible for him to have treated Miss Hill improperly, as he was never with her alone, and because the evidence showed that she was improving and getting well, and further the affidavits of the jurors attached to this Bill of Exception shows improper conduct on part of the jurors, and all of which matters were within the sound discretion of the Court, and are matters for consideration for this Court upon the whole case, and as to whether or not the Court exercised an unfair and unjust discretion towards the petitioner in not postponing said cause to enable your petitioner to meet the issue so improperly raised, whether it was within the right of cross-examination of plaintiff, or whether plaintiff had a right to introduce such testimony as explanatory of the reason why she did not return to said sanitorium for treatment, and said treatment was material to defendant's defense upon the issue raised in the motion to continue or postpone to enable the defendant to properly meet said defense, all of which testimony and affidavits upon the point is set out in Bill of Exception No. 11, to which reference is made.

Wherefore your petitioner prays that the Honorable Court of Appeals will herein consider the foregoing assignments of error, and will adjudge and decree that the said verdict and judgment thereupon to be wrong, and will reverse the same, and send the case back to the United States District Court with instructions to receive in accordance with its opinion. If the Court shall not reverse said cause, and will follow the Texas statute governing the Appellate Courts in said State, that then this Honorable Court will ex-

ercise its power and authority to reduce said judgment, which is unreasonably excessive.

W. T. ARMISTEAD,  
COBBS, ESKRIDGE & COBBS,

Attorneys for Texas & Pacific Railway Co.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Ry. Co. and T. & P. Ry. Co.  
Assignments of Error.

Filed July 15th, 1913. D. H. Hart, Clerk.

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WRIT OF ERROR.

The United States District Court, Western District  
of Texas, at San Antonio, Texas.

Clara Hill

vs.

No. 182.—*Law.*

I. & G. N. Railway Co. and Texas & Pacific Ry. Co.

United States of America, ss.:

*The President of the United States:*

*To the Honorable the Judges of the District Court of  
the United States for the Western District of  
Texas—Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the Texas & Pacific Railway Co., plaintiff in error, and Clara Hill, defendant in error, manifest error hath happened, to the great damage of the said Texas & Pacific Railway Co., plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been,



should be corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals, may cause further to be done herein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 15th day of July, in the year of our Lord one thousand nine hundred and thirteen.

D. H. HART,

Clerk District Court of the United States for the  
Western District of Texas.

Allowed July 15th, 1913.

T. S. MAXEY,

United States District Judge.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and Texas &  
Pacific Railway Co.

Writ of Error.

Filed July 15th, 1913. D. H. Hart, Clerk.

BOND.

The United States District Court, Western District  
of Texas, at San Antonio, Texas.

Clara Hill

vs.

No. 182.—Law.

I. & G. N. Railway Co. and Texas & Pacific Ry. Co.

*Know All Men By These Presents:*

That we, the Texas & Pacific Railway Co., as principal, and J. H. Ardrey and R. H. Stewart as sureties are held and firmly bound unto Clara Hill, plaintiff, in the sum of twenty-five thousand (\$25,000.00) dollars to be paid to the said Clara Hill, plaintiff, her certain attorneys, executors, administrators or assigns, which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seal and dated this the 15th day of July in the year of our Lord, one thousand nine hundred and thirteen.

Whereas, lately at a session of the United States District Court for the Western District of Texas, at San Antonio, Texas, in said suit, No. 182, at Law, between Clara Hill, plaintiff, and the International & Great Northern Railway Co. and the Texas & Pacific Railway Company, defendants, a judgment was rendered against the Texas & Pacific Railway Co. on the verdict of the jury for twenty-one thousand, five hundred (\$21,500.00) dollars, with six per cent interest from date of judgment, which judgment is substantially as follows:

“In the United States District Court, for the Western District of Texas, at San Antonio. Clara Hill

vs. No. 182, Law, I. & G. N. Railway Co. and Texas & Pacific Ry. Co.

On this, the 13th day of May, came on the above entitled cause, being duly reached and called for trial, all parties came and announced ready on the law of the case. The Court after having heard all pleas and all exceptions of the defendant, having considered the same and having heard the evidence thereupon, is of the opinion that none of the said pleas nor exceptions are well taken and each and every one of the same are hereby overruled, which ruling of the Court the defendants then and there and in open Court excepted, and thereupon came a jury of good and lawful men, to-wit: H. E. Hatch, and eleven others, who, having been duly selected, empanelled, and sworn, heard the pleadings, the evidence, and the charge of the Court, and thereafter on the 16th day of May, 1913, retired to consider of their verdict and on the same day the jury returned into open Court the following verdict:

“We, the jury find for the plaintiff against the Texas & Pacific Railway Company, and assess her damages at twenty-one thousand and five hundred (\$21,500.00) dollars; and we further find in favor of the defendant, International & Great Northern Railway Company.

“(Signed) H. E. HATCH,  
“Foreman.”

Said verdict having been read to the jury, they said it was their verdict, and thereupon the Court approved said verdict and ordered it filed and judgment is now entered thereon.

It is ordered and adjudged that the plaintiff, Clara Hill, do have and recover of the Texas & Pacific Railway Company, the sum of twenty-one thousand and five hundred dollars, together with interest thereon

from the 16th day of May, 1913, until paid, and together with all costs in this behalf expended, for all of which let execution issue.

It is further ordered that the plaintiff take nothing against the defendant, International & Great Northern Railway Company, and that said company go hence without day, and recover all costs which it has expended in this cause.

It is further ordered, however, that the said execution herein before directed, shall not be issued before sixty days after adjournment of this term of this Court, and it is also further ordered that the defendant shall have ninety days from and after the adjournment of this Court in which to prepare and present for approval and file its Bills of Exception."

To which judgment the defendant, Texas & Pacific Railway Company, excepted.

Now, the condition of the above obligation is such that if the said Texas & Pacific Railway Co. shall prosecute its said Writ of Error with effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force, virtue and effect.

TEXAS & PACIFIC RAILWAY COMPANY,

By W. L. HALL,  
General Attorney.

J. H. ARDREY,  
R. H. STEWART.

Approved this 15th day of July, A. D., 1913.

T. S. MAXEY,  
United States District Judge.

DAY LETTER.

The Western Union Telegraph Company

25,000 Offices in America. Cable Service to all the  
World.

Received at 142 West Commerce St., San Antonio.  
Phones Crocket 4321, New 4321. Always open.

B-27-DA. VP. 47—Blue. 14 Extra.

Dallas, Texas, July 15, 1913.

Clerk U. S. District Court,

San Antonio, Texas.

A bond signed by J. H. Ardrey and R. H. Stewart  
for twenty-five thousand dollars would be accepted  
and approved by me. I regard these parties as ample  
security for that amount.

LOUIS MAYNARD,

Clerk U. S. District Court, Northern District of  
Texas. By E. C. Van Dusen, Deputy.  
12:20 P. M.

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and Texas &  
Pacific Railway Co.

Bond.

Filed July 15, 1913. D. H. Hart, Clerk.

CITATION IN ERROR.

The United States District Court, Western District  
of Texas, at San Antonio, Texas.

Clara Hill

vs.

No. 182.—*Law.*

I. & G. N. Railway Co. and Texas & Pacific Railway  
Co.

United States of America, ss.

*The President of the United States:*

*To Clara Hill, Defendant in Error; Magus Smith,  
her Attorney of Record, both of whom reside in  
Frio County, Texas, and P. J. Lewis and H. C.  
Carter, her other Attorneys of Record, of Bexar  
County Texas—Greeting:*

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Fifth Circuit to be held at the city of New Orleans, in the State of Louisiana, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Texas, wherein the Texas & Pacific Railway Company is plaintiff in error, and Clara Hill is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 15th day of July, A. D., 1913.

Signed July 15th, 1913.

T. S. MAXEY,

United States District Judge.

Attest:

D. H. HART, Clerk.

UNITED STATES MARSHAL'S RETURN.

Received this Original Citation in Error on the 16th day of July, A. D., 1913, and have executed the same, this the 17th day of July, A. D., 1913, by delivering to Magus Smith (attorney of record for defendant in error, Clara Hill), in person, at Pearsall, Frio County, Texas, a certified copy thereof.

J. H. ROGERS,

U. S. Marshal, Western District of Texas.

By JOHN L. DIBRELL,

Deputy.

Fees .....	\$2.00
Expenses .....	\$4.90
	<hr/>
Total .....	\$6.90

Endorsed: No. 182 Law.

Clara Hill vs. I. & G. N. Railway Co. and Texas & Pacific Railway Co.

Original Citation in Error.

Filed July 15, 1913. D. H. Hart, Clerk.

CLERK'S CERTIFICATE.

The United States of America, Western District of  
Texas.

I, D. H. Hart, Clerk of the District Court of the United States, in and for the Western District of Texas, hereby certify that the foregoing on 358 pages, from 1 to 358 inclusive, is a true and correct transcript of proceedings had and orders entered as therein stated, in cause No. 182 Law, Clara Hill vs. International & Great Northern Railway Company and The Texas & Pacific Railway Company, as the same appears on file and of record in this office, except that the Original Writ of Error and Citation in Error are included at pages 351 herein, and 357 instead of copies thereof.

Witness my official signature and the seal of the said District Court at office in the City of San Antonio, Texas, this the 25th day of October, A. D., 1913.

(Seal)

D. H. HART,  
Clerk.

By A. I. Campbell, Deputy.



That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

*Argument and Submission.*

Extract from the Minutes of March 25th, 1914.

No. 2587.

TEXAS & PACIFIC RAILWAY COMPANY  
versus  
CLARA HILL.

On this day this cause was called, and, after argument by T. D. Cobbs, Esq., for plaintiff in error, and Perry J. Lewis, Esq., for defendant in error, was submitted to the Court.

*Opinion of the Court.*

Filed April 16th, 1914.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2587.

TEXAS & PACIFIC RAILWAY COMPANY  
versus  
CLARA HILL.

Error to the United States District Court, Western District of Texas.  
Before Pardee and Shelby, Circuit Judges, and Foster, District Judge.

By the COURT:

On consideration of the transcript and the assignments of error, we find no reversible error in this case.

The judgment of the District Court is affirmed.

*Judgment.*

Extract from the Minutes of April 16th, 1914.

No. 2587.

TEXAS & PACIFIC RAILWAY COMPANY  
versus  
CLARA HILL.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, The Texas & Pacific Railway Company, and the sureties on the writ of error bond herein, J. H. Ardrey and R. H. Stewart, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

*Petition for Writ of Error, Assignments of Error, and Order Allowing Writ of Error.*

Filed April 22nd, 1914.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 2587.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,  
vs.

CLARA HILL, Defendant in Error.

*Petition for Writ of Error, Assignment of Errors, and Order Allowing Writ of Error.*

To the Honorable the Supreme Court of the United States:

Now comes the Texas & Pacific Railway Company and shows to the Court that in the trial and proceedings, and in the judgment rendered in the above cause, in the United States Circuit Court of Appeals, for the Fifth Circuit, on April 16th, 1914, error has intervened to the damage of the Texas & Pacific Railway Company, as is shown by the following assignment of errors:

**First.**

The Court erred in not sustaining the first assigned error, which is as follows:

The Court erred in not sustaining the several pleas in writing of the defendants, which pleas are set forth in the pleading of defendants, and which were overruled by the Court, as recited in the judgment of the Court, and as further shown by Bill of Exception No. 1 herein, to the effect that the suit was originally and improperly brought in Frio county against the Texas & Pacific Railway Company because it had its domicile in the northern district of Texas, in Dallas County, Texas, having no railroad or local agent in Frio county, its co-defendant having a railroad and local agent in Frio county, but had its residence and domicile in Harris County, Texas, because the I. & G. N. Ry. Co. so having its local agent in said county did not justify the plaintiff to file its suit in said county against the Texas & Pacific Ry. Co., which said company was alleged

to have committed a tort and injury to the plaintiff upon the line of its railway, and there is no valid law that would justify the institution of said suit against the T. & P. Ry. Co., and to hold it in said Frio county, and the District Court having the same power to pass upon said question of jurisdiction upon the said proper plea being filed, raising the same, and the privilege of said defendant to be so sued in its own district, was error in the Court in not sustaining, and dismissing the same, there being no valid law in Texas justifying such action.

### Second.

The Court erred in not sustaining the second assigned error, which is as follows:

The Court erred in excusing the jurors J. M. Vance and J. G. Lentz, because they stated they were opposed to "fake damages suit litigation," and thereby prejudiced to that extent, but that they were not opposed to legitimate cases, and said Vance and Lentz both being business men in San Antonio, and qualified jurors in every respect, and their statements as shown by Bill of Exceptions No. 2 does not render them incompetent jurors, the evidence showing that the jurors who tried said cause also were further prejudiced by certain facts developed in said cause, as shown in the affidavits attached to Bill of Exception No. 11 upon the refusal of the Court to cut down said judgment or to grant a postponement thereof, as is likewise set out in Bill of Exception No. 3 on the application to postpone said cause, the said jurors, or some of them, who tried said cause were influenced and prejudiced, which might not have occurred if jurors of the character and stamina of said Vance and Lentz had been permitted to remain on said jury, they not having disqualified themselves, and it was error in the Court below to so hold, because they were opposed to "fake damage suit litigation."

### Third.

The Court erred in not sustaining the third assigned error, which is as follows:

The Court erred in refusing to postpone the case to give the defendants an opportunity to meet the charge against Dr. Dale, one of the leading witnesses for defendants, against whom it was testified by Clara Hill, the plaintiff, that Dr. Dale had been guilty of improper conduct towards her while she was in the institution, which testimony being so prejudicial against defendants that defendants should have been allowed time to secure witnesses to contradict Clara Hill, and to sustain the good character and good name of said Dr. Dale, and to show by the witnesses as was shown and set out in Bill of Exception No. 11 referred to as a part of this, that Dr. Dale was a man of irreproachable character, and that no opportunity for anything of the kind could happen, because the nurses were always present when he attended to patients, and said testimony could have no other effect than a prejudicial one against defendants, and if an objection to the admissibility of such testimony had been made thereto, whether sustained or not, would carry with it to the mind

of the jury inferences that could not have been met by direct testimony, and no action of the Court in sustaining such an objection, or instructing the jury not to consider the same would have removed its prejudicial effect, it being one of those cases where an absolute contradiction could have been of no beneficial effect, and it was a matter of discretion wholly in the Court as to whether or not a postponement should have been given, the said Court lasting from May to and into July, and would have involved in all probability the continuance of not more than one or two days to procure such testimony. That the refusal of the Court, as shown by the testimony in Bill of Exception No. 11, and purpose of such continuance being set out by a motion in writing in Bill of Exception No. 3, the Court exercised a harsh and injurious discretion against the defendants, as shown by the size of the verdict, to-wit, \$21,500.00. All of said testimony would have gone, and did go to the weight and credibility of plaintiff's testimony, there being a sharp conflict between the plaintiff and other witnesses, especially Dr. Dale and Dr. Strawn, physicians who attended to her immediately after the alleged accident, it being shown by said witnesses that she was, and would have recovered if she had remained under his, or some other like proper treatment. (See Bills of Exceptions Nos. 3 and 11.)

#### Fourth.

The Court erred in not sustaining the fourth assigned error, which is as follows:

The Court erred in refusing to charge the jury peremptorily to find for the defendants, as requested by them in Charge No. 1, Bill of Exception No. 5, which is as follows:

"You are instructed that under the evidence you will find a verdict for the defendant (Texas & Pacific Ry. Co.) because such injuries as plaintiff sues for could not be, and were not the direct and proximate cause of the collision and shock, if any, to plaintiff."

#### Fifth.

The Court erred in not sustaining the fifth assigned error, which is as follows:

The Court erred in the first paragraph of its instructions, as follows:

"In this case I charge you that the evidence has not developed any liability on the part of the defendant, International & Great Northern Railway Company, and I therefore charge you that you must return a verdict for this company, and proceed to consider the case against the Texas & Pacific Railway Company, under the following instructions."

#### Sixth.

The Court erred in not sustaining the sixth assigned error, which is as follows:

The Court erred in its general charge, as follows:

"If you believe from the evidence that the plaintiff directly re-

ceived any of the injuries alleged in her petition by reason of said collision, then I charge you that your verdict must be for the plaintiff in such a sum as will fairly compensate her for any such injuries as were received and as set forth and claimed by her in her petition; and in assessing damages you should take into consideration the reasonable expenses which the plaintiff has incurred for drugs, hospital services, and medical and surgical treatment, which you may find were reasonably necessary in the proper treatment of any injuries which you may find she received. In estimating such damages, you will also take into consideration the mental and physical suffering, if any, which the plaintiff has undergone by reason of any such injuries; and if you find that any such injuries are permanent, you should also consider any mental and physical suffering which any such injuries will produce upon the plaintiff in the future. And if you find that any such injuries are permanent, and that they will diminish the plaintiff's capacity to labor and earn money in the future, then I charge you that this element of damages also should be considered."

#### Seventh.

The Court erred in not sustaining the seventh assigned error, which is as follows:

The Court erred in that portion of its charge, as follows:

"In this case the defendants charge that the operation and removal of the plaintiff's ovaries was unnecessary, and that the surgeon who performed said operation was guilty of mal-practice. In this connection I charge you that the plaintiff would not be responsible for the errors or mistakes of the surgeon who performed the operation, provided she used ordinary care in the selection of a reasonably competent surgeon, and did select a reasonably competent surgeon, and submitted her case to his judgment. If you find from the evidence that the plaintiff received hurts in said collision which led to the injury and impairment of her ovaries, and if you further find that she used ordinary care in the selection of a reasonably competent surgeon, that is, such care as a person of ordinary prudence would have exercised under similar circumstances, and did employ a reasonably competent surgeon to perform said operation, and that he, acting upon his judgment, removed her ovaries, then I charge you that the defendant would be liable for the condition produced by reason of said ovaries being removed, notwithstanding some other course pursued by the surgeon might have saved the removal of her ovaries."

#### Eighth.

The Court erred in not sustaining the eighth assigned error, which is as follows:

The Court erred in submitting to the jury the question as to whether or not the plaintiff received hurts in said collision which led to the injury and impairment of the ovaries, without instructing the jury that such injuries could only result from causes alleged by plaintiff to come from a shock or concussion, and again has made

her right to recover depend upon the selection of a person of ordinary care and prudence to perform the operation, whether it was required or not; and makes the case depend upon whether or not the surgeon who performed the operation was justified or not in performing same would entitle her to recover, notwithstanding some other course pursued by the surgeon might have saved the removal of her ovaries.

#### Ninth.

The Court erred in not sustaining the ninth assigned error, which is as follows:

The Court further erred because in the general charge it did not submit all the issues in said cause, and especially the defenses asserted and presented by defendants in their answer, all of which exceptions to the general charge of the Court, above enumerated, were noted at the time, and preserved in Bill of Exception No. 4.

#### Tenth.

The Court erred in not sustaining the tenth assigned error, which is as follows:

The further errors in the General Charge of the Court was instructing the jury that the plaintiff would not be responsible for the errors and mistakes of the surgeon who performed the operation, provided she used ordinary care in the selection of a reasonable competent surgeon.

Our contention in this connection being:

(a) Whether the particular operation was necessary was an issue for the jury, on defendant's proof, to determine and the Court should have submitted to the jury, whether or not she used proper care in first ascertaining, by making preparation for the restoration of her health, before selecting any surgeon to perform any such operation:

(b) Whether her condition required the operation:

(c) Whether the operation eventually was made by a doctor who removed more of the plaintiff's organs than were necessary, to restore her to health:

(d) Whether she received the injury, if any, on the train, which was or was not, such as to cause the condition, stated, by the surgeon, who performed the operation, the plaintiff having alleged she received a severe shock and concussion and by reason thereof, her nervous system was severely shocked and injured and impaired, and did not then claim to be injured. It is nowhere alleged that she was hurt on account of the collision or that she received hurts in said collision, and the only injuries she received, pleaded by her, were injuries received from "shock and concussion" and not by any other injury that hurt her. The Court's attention was called specifically to the failure of plaintiff to allege any hurt or injury other than was occasioned by a severe shock, and it was upon this petition that the case was tried, and the Court erred in submitting any other injury than alleged for the consideration of the jury.

(e) And the Court erred in making, as the Court did, the plaintiff's cause of action on account of the operation and her recovery

therefor, depend as to whether she employed "a reasonably competent surgeon to perform said operation." Refused to submit any issue as to whether she ought to have used ordinary care in relieving herself from such injuries before going under the surgeon's knife, or using ordinary care in avoiding an operation, rather than her right to recover for the injuries done her, if she did employ "a reasonably competent surgeon to perform said operation", and not leaving for the jury to say whether she ought to have been operated upon or not.

(f) The Court refused to submit in its General Charge to the jury, defendant's defense that she was induced to submit to the operation, whether necessary or not, or if the operation was wholly unnecessary, or whether it was on account of plaintiff's condition prior to the time when the operation was made upon her.

(g) That the plaintiff had gotten well and recovered from the effects of the injury and that the operation upon her was not the direct and immediate result of the injury caused by the "shock or the concussion" in the alleged accident, but was on account of her own carelessness and want of care in allowing the said operation to take place, which was the proximate cause of the loss of her ovaries.

#### Eleventh.

The Court erred in not sustaining the eleventh assigned error, which is as follows:

The Court erred in refusing to give Special Charge No. 2 set out in Bill of Exception No. 6, requested by the defendants, as follows:

"If under the instructions herein given you, you find for the defendant, the International & Great Northern Railway Company, I further charge you that you cannot find for the plaintiff against the Texas & Pacific Railway Company, and you will so find."

#### Twelfth.

The Court erred in not sustaining the twelfth assigned error, which is as follows:

The Court erred in refusing to give Special Charge No. 3 set out in Bill of Exception No. 8, requested by the defendants, as follows:

"Defendants request the court to charge the jury that if they believe the train upon which plaintiff claims to have been hurt, did get off the track, or rather run into a switch on a side track unexpectedly, as the switch was set for the side track instead of the main line by some party unknown to the defendant, and without any fault or negligence on its part, then you will find for the defendant."

#### Thirteenth.

The Court erred in not sustaining the thirteenth assigned error, which is as follows:

The Court erred in refusing to give Special Charge No. 5 set out in Bill of Exception No. 7, requested by the defendants, as follows:

"If you believe from the evidence that the plaintiff had the opera-



tion performed, as alleged on account of hurts received in the accident, you cannot consider any injury that came to her from the same unless it came as a result from the shock received in said train or from concussion, there being no allegation in plaintiff's pleading that the injury was received in any other way; and in considering the injuries received from them or from the collision, you will disregard every element of injury that could flow entirely from traumatism, that is, a blow of some kind."

#### Fourteenth.

The Court erred in not sustaining the fourteenth assigned error, which is as follows:

The Court erred in refusing to give Special Charge No. 6, set out in Bill of Exception No. 9, requested by the defendants, as follows:

"If you believe that the plaintiff's condition as alleged by her, was brought about by reason of her prior condition and her acts and conduct thereafter, and any injuries resulting from the operation, and the others would not have occurred except for the result of her own negligence in having said operation performed as no person of ordinary care and prudence would have undergone, and notwithstanding the alleged act of negligence upon the part of the railroad, the present injuries are the direct and immediate result of said act, following in natural and unbroken sequence, and the railroad company was not guilty of any negligence resulting from her alleged injuries which were the proximate result of her said accident in the defendant's trains of cars, but was on account of her own carelessness and want of care in allowing said operation to take place, which was the proximate cause of her injuries, you will find for the defendant."

#### Fifteenth.

The Court erred in not sustaining the fifteenth assigned error, which is as follows:

The Court erred in refusing to give Special Charge No. 9 set out in Bill of Exception No. 10, requested by the defendants, as follows:

"You are instructed that if you believe from the evidence that at the time the plaintiff was operated upon that she was a neurasthenic and was suffering from neurasthenia, and that she was influenced to submit herself to the surgical operation when it was not necessary, and when other treatment would have entirely cured and relieved her, and that she did not use and exercise ordinary care, and such want of care, if you believe she did not exercise proper care, caused her to select a doctor when it was not necessary, and that her act contributed to the injury, then the railroad company would not be responsible in damages for the consequences of the operation that was performed upon her; and you will, in summing up the amount of damages you find she was entitled to, if any, not consider the operation upon her and the removal of any other organs in finding a judgment and assessing damages against the defendant, but will only assess such damages as arose from the injury otherwise than as hereinabove instructed."



## Sixteenth.

The Court erred in not sustaining the sixteenth assigned error, which is as follows:

The said verdict was excessive, and outrageously high, and shows that the same was the result of prejudice.

## Seventeenth.

The Court erred in not sustaining the seventeenth assigned error, which is as follows:

The Court erred in refusing to grant the defendant a postponement or continuance, and to cut down the said excessive verdict, as shown by Bill of Exception No. 11, which Bill of Exception No. 11 was asked to be considered in connection with the third Assignment of Error, and third Bill of Exception, because the Court had it in its power to remedy the wrong by either granting a new trial, as it was requested or a postponement of the case because the evidence showed from the affidavits of the nurses, Kathleen Childress, Miss Nelson and Miss Ester, and their reports of the condition of Miss Clara Hill, plaintiff, while she was in said hospital, and by the affidavits of the other witnesses, that Dr. Dale was a man of irreproachable character, and it was impossible for him to have treated Miss Hill improperly, as he was never with her alone, and because the evidence showed that she was improving and getting well, and further affidavits of the jurors attached to this Bill of Exception shows improper conduct on part of the jurors, and all of which matters were within the sound discretion of the Court, and are matters for consideration for this Court upon the whole case, and as to whether or not the Court exercised an unfair and unjust discretion towards the petitioner in not postponing said cause to enable your petitioner to meet the issue so improperly raised, whether it was within the right of cross-examination of plaintiff, or whether plaintiff had a right to introduce such testimony as explanatory of the reason why she did not return to said sanatorium for treatment, and said treatment was material to defendant's defense upon the issue raised in the motion to continue or postpone to enable the defendant to properly meet said defense; all of which testimony and affidavits upon the point *is* set out in Bill of Exception No. 11, to which reference is made.

## Eighteenth.

The Honorable Court of Appeals erred in not writing an opinion covering the assignments, or some of them, set forth, and contended for, for this:

It cannot be determined, from the opinion of the Court, the views of the Court upon each of said assignments, and the said questions involved are of such importance and magnitude as to justify a written opinion.

The Texas & Pacific Railway Company desires to remove said cause to the United States Supreme Court from the United States Cir-

cuit Court of Appeals of the Fifth Circuit, for correction of said errors.

Wherefore, it prays that the Texas & Pacific Railway Company be granted a Writ of Error in the above cause to remove the same to the United States Supreme Court, to have the proceedings and judgment herein, reviewed, revised and corrected.

It prays that the amount of supersedeas bond be fixed by the Court.

(Signed)

T. D. COBBS,  
*Attorney for Texas & Pacific Ry. Co.*

The above application for a Writ of Error, and assignment of error, has been presented to me, and the same is allowed and granted, and the amount of supersedeas bond fixed at \$1,000.00.

(Signed)

DON A. PARDEE,  
*Circuit Judge.*

April 21st, 1914.

*Bond on Writ of Error.*

Filed April 22nd, 1914.

In the United States Circuit Court of Appeals, Fifth Circuit.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,  
versus

CLARA HILL, Defendant in Error.

Bond for Writ of Error.

Know all men by these presents, That we, The Texas & Pacific Railway Company, a corporation duly incorporated and organized under and by virtue of an Act of Congress, of the United States, as principal, and Charles Godchaux and Charles Payne Fenner, as sureties, in the full and just sum of one thousand dollars (\$1,000.00), to be paid to the said Clara Hill, or her certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of April, in the year of our Lord, one thousand nine hundred and fourteen.

Whereas, lately at a Session of the United States Circuit Court of Appeals, holding sessions in and for the Fifth Circuit, in a suit depending in said Court, between The Texas & Pacific Railway Company and Clara Hill, a judgment was rendered, on April 16th, 1914, against the said Texas & Pacific Railway Company, affirming a judgment which was rendered in said cause on the 16th day of May, 1913, in the District Court of the United States, for the Western District of Texas, at San Antonio, for the sum of Twenty-One Thousand, Five Hundred and 0/100 (\$21,500.00) Dollars, and costs of suit, with six per cent (6%) interest thereon from the date of said

judgment, and whereas the said Texas & Pacific Railway Company has obtained a writ of error and has filed a copy thereof in the Office of the Clerk of the said United States Circuit Court for the Fifth Circuit, to reverse the judgment in the aforesaid suit, and has also obtained a citation directed to the said Clara Hill, and her attorneys of record, Perry J. Lewis, H. C. Carter, and Magus Smith, citing and admonishing them to appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, within thirty (30) days from the date thereof.

Now the condition of the above obligation is such, That if the said Texas & Pacific Railway Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed)

TEXAS & PACIFIC RAILWAY CO.,  
By T. D. COBBS, *Agent and Attorney.*  
CHARLES GODCHAUX.  
CHARLES PAYNE FENNER.

Sealed and delivered in presence of—

April 21st, 1914.

Approved by—

(Signed) DON A. PARDEE,  
*Circuit Judge.*

*Clerk's Certificate.*

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 360 to 372 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2587, wherein Texas & Pacific Railway Company is plaintiff in error, and Clara Hill is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 359 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 27th day of April, A. D. 1914.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,  
*Clerk of the United States Circuit Court of Appeals.*

## THE UNITED STATES OF AMERICA:

The President of the United States to Clara Hill, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within Thirty days from the date hereof, pursuant to a writ of error sued out and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, in the cause wherein The Texas and Pacific Railway Company is plaintiff in error, and Clara Hill is defendant in error, to show cause, if any there be, why the judgment rendered against the said Texas and Pacific Railway Company, petitioner, and in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 21st day of April, in the year of our Lord one thousand nine hundred and fourteen.

DON A. PARDEE,  
*United States Circuit Judge.*

[Endorsed:] Original. Return. No. 2587. United States Circuit Court of Appeals, Fifth Circuit. The Texas & Pacific Railway Company, Plaintiff in Error, vs. Clara Hill, Defendant in Error. Citation. U. S. Circuit Court of Appeals. Filed Apr. 25, 1914. Frank H. Mortimer, Clerk.

I hereby accept service of this Citation with like effect as if served on Miss Clara Hill this 24th day of April 1914.

PERRY J. LEWIS,  
*Att'y for Miss Clara Hill.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and Clara Hill, defendant in error, No. 2587 of the docket, a manifest error hath happened, to the great damage of the said Texas and Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said

Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 21st day of April, in the year of our Lord one thousand nine hundred and fourteen.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,

*Clerk of the United States Circuit Court of Appeals.*

Allowed by

DON A. PARDEE,

*Circuit Judge.*

[Endorsed:] No. 2587. United States Circuit Court of Appeals, Fifth Circuit. The Texas & Pacific Railway Company, Plaintiff in Error, vs. Clara Hill, Defendant in Error. Writ of Error.

CLERK'S OFFICE.

I hereby certify that a true copy of the within Writ has this day been lodged in the Clerk's Office for the use of the Defendant in Error.

Dated this 22nd day of April, A. D. 1914.

FRANK H. MORTIMER, *Clerk.*

Endorsed on cover: File No. 24,218. U. S. Circuit Court Appeals, 5th Circuit. Term No. 482. The Texas & Pacific Railway Company, plaintiff in error, vs. Clara Hill. Filed May 15th, 1914. File No. 24,218.

Office Supreme Court, U. S.

FILED

JAN 19 1915

JAMES D. HANCOCK

CLERK

IN THE

# Supreme Court of the United States

No. 482.

TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error.*

vs.

CLARA HILL, *Defendant in Error.*

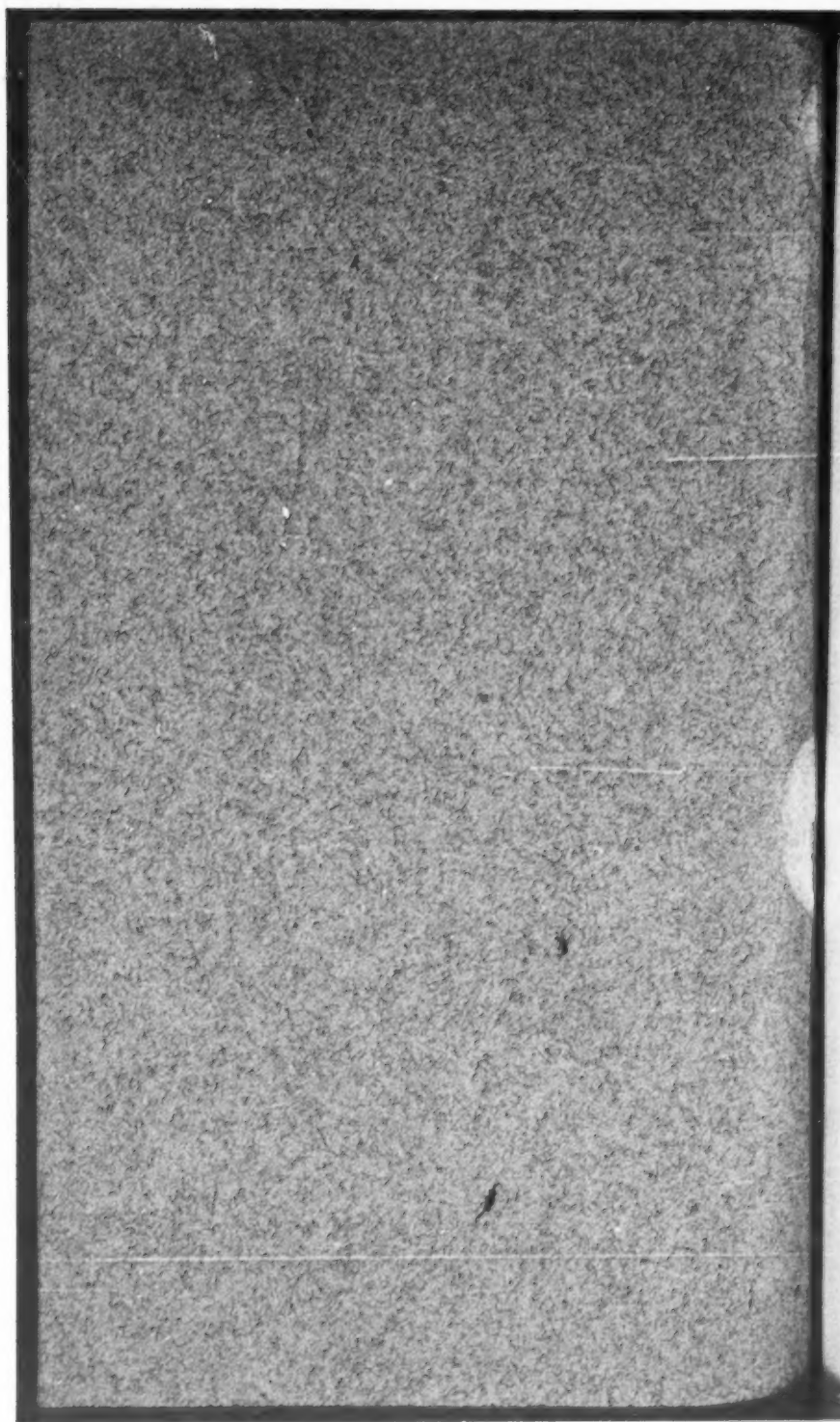
## Motion to Affirm or Dismiss, and Brief of Defendant in Error

MAGUS SMITH,

H. C. CARTER,

PERRY J. LEWIS,

*Attorneys for Defendant in Error.*





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IN THE

# Supreme Court of the United States

OCTOBER TERM 1914.

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TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error*,

vs.

CLARA HILL, *Defendant in Error*.

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MOTION TO AFFIRM OR DISMISS, AND BRIEF AND ARGUMENT OF DEFENDANT IN ERROR ON SAID MOTION.

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MOTION TO AFFIRM OR DISMISS FILED BY DEFENDANT  
IN ERROR.

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Now comes Clara Hill, defendant in error, by her attorneys appearing in her behalf, and moves the court to affirm or dismiss the above entitled cause under sub-divisions 5 and 6 of Rule 6 of the Supreme Court of the United States, because it is manifest that the writ of error in this cause was sued out for delay only,

and that the questions on which said cause depends are so frivolous as not to need further argument, and are settled and precluded by the previous decisions of this Honorable Court.

#### STATEMENT OF NATURE AND RESULT OF CASE.

This action was brought by Miss Clara Hill, defendant in error, against the International & Great Northern Railway Company and the Texas & Pacific Railway Company in the State District Court of Frio County, Texas, for damages for personal injuries sustained by her in a head-end collision of the train on which she was a passenger. She took passage at Pearsall, Frio County, Texas, destined to Atlanta, Cass County, Texas, and was sold a through ticket to destination by the agent of the International & Great Northern Railway Company, at Pearsall. Before reaching her destination, and while on the line of the Texas & Pacific Railway Company, plaintiff in error, her train ran into an open or misplaced switch and came into violent collision with another train of the plaintiff in error, and in this collision she sustained the personal injuries sued for. Defendant in error sued both railway companies, because the International & Great Northern Railway Company contracted, without any limitations or restrictions, to transport her safely to her destination; and the Texas & Pacific Railway Company negligently caused and permitted the train in which she was riding to come into violent collision with another train.

In the State District Court the International & Great Northern Railway Company answered by plea and to the merits, and the Texas & Pacific Railway Company, joined by its co-defendant, removed the cause to the United States District Court for the Western District of Texas on the sole ground that the Texas & Pacific Railway Company was a Federal Corporation.

Defendant in Error, in proper time, moved to remand the cause to the State Court, which motion was resisted by both adverse parties, and a written reply was filed stating that the United States District Court "had the sole and exclusive jurisdiction by virtue of the removal."

The motion to remand was duly overruled, and by written motion both defendants continued the cause to the next term of court.

At the following term there was a trial of the cause before a jury, and the court instructed a verdict in favor of the International & Great Northern Railway Company. As to the Texas & Pacific Railway Company, the trial court fairly and fully presented the issues to the jury, in a charge instructing the jury that the evidence showed there was a collision of two passenger trains on the line of the Texas & Pacific Railway Company, and that defendant in error was a passenger on one of these trains, and submitting to the jury that if they found from the evidence that she was injured by reason of said collision, then to allow her such damages as would be fair compensation for the injuries sustained by reason of the collision.

There was a verdict and judgment against the Texas & Pacific Railway Company for the sum of \$21,500.00.

A motion for new trial was duly presented, and upon proper consideration, was overruled.

The Texas & Pacific Railway Company prosecuted a Writ of Error to the United States Circuit Court of Appeals, sitting at New Orleans, La., where the case was submitted upon briefs and oral argument.

The Circuit Court of Appeals found no error in the record and affirmed the cause.

The plaintiff in error complained in the United States Cir-

cuit Court of Appeals that the trial court erred in not sustaining its plea of venue, and dismissing the cause on the theory that the District Court for the Western District of Texas was without jurisdiction to try the cause; it also complained that the trial court erred in excusing two jurors on their "Voir Dire" examination because of prejudice; it also complained that the trial court erred in not postponing or continuing the case while the trial was in progress to allow plaintiff in error more time to meet certain testimony. It also complained that the verdict of the jury awarding damages was excessive, and that the trial court should have granted a new trial, or required a remittitur to be entered; the remaining propositions presented to the Circuit Court of Appeals were based upon complaints of the court's charge to the jury and of special charges which were refused.

There were no assignments of error presenting a real or substantial Federal question; no act or statute of the United States Congress was either directly or indirectly involved. The action was simply and solely a common law action for negligence of a carrier in having a head-end collision of two of its passenger trains, and a resulting injury to a passenger. No questions were involved other and beyond such as are ordinarily incident to suits of this character, and the judgment of the United States Circuit Court of Appeals affirming the judgment of the trial court would have finally disposed of this cause, but for the fact that the Texas & Pacific Railway Company enjoys the privilege of operating its road under a charter granted by an act of the United States Congress, a circumstance that has nothing whatever to do with the merits of the controversy, or with any assignment of error presented by the plaintiff in error.

All of the questions presented in the United States Circuit Court of Appeals, and now presented in this Honorable Court

are of a character which it was the purpose of the judiciary act to submit to the final jurisdiction of the Circuit Court of Appeals, and while this Honorable Court may have jurisdiction merely because the plaintiff in error is a Federal Corporation, yet there is no real or substantial Federal question involved, and the assignments of error presented in this court and in the Circuit Court of Appeals are such as are usually incident to the trial of a common law action for negligence. These questions, based upon the action by the trial court in granting or refusing preliminary motions for postponement or continuance, giving or refusing special charges, excusing jurors and overruling the motion for new trial, under the settled decisions of this court, are not reviewable.

The defendant in error, by her attorneys, present with this motion to affirm or dismiss, a printed brief and argument in support hereof which is hereto annexed.

WHEREFORE, defendant in error prays that this cause be affirmed with a penalty for delay, or dismissed; or that if the motion to affirm or dismiss be not granted, that the cause be transferred for hearing to the summary docket and disposed of.

Magus Smith  
Attorney - Perry J. Lewis

Attorneys for Defendant in Error, Clara Hill.



IN THE

# Supreme Court of the United States

OCTOBER TERM 1914.

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No. 482.

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TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

CLARA HILL, *Defendant in Error.*

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE FIFTH CIRCUIT.

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BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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STATEMENT OF THE NATURE AND RESULT OF THE  
CASE.

This suit was brought by the defendant in error, Miss Clara Hill, against the International & Great Northern Railway Company and the Texas & Pacific Railway Company in the District



Court of Frio County, Texas. Plaintiff's petition, in substance, alleged that the International & Great Northern Railway Company operated its line of railway into and through Frio County, Texas, and that the Texas & Pacific Railway Company was a connecting carrier, whose line connected at Longview, Texas, and extended thence to Atlanta, Texas; that the plaintiff purchased through transportation from Pearsall, Texas, to Atlanta, Texas, and was given a ticket, or an instrument of writing, evidencing her right to through transportation to Atlanta, Texas, and that said ticket, or instrument of writing, was honored by both companies, and that plaintiff was transported from Pearsall, Texas, to Longview, Texas, and was there received by the Texas & Pacific Railway Company, to be transported to Atlanta, Texas, and that when the train on which she was a passenger was near the town of Atlanta, Texas, there was a collision of said train with another train, and as a result of the said collision, plaintiff was severely and permanently injured. (Record, p. 4.)

Plaintiff also alleged that the defendants were partners and were acting as the agents of each other in making the contract of transportation.

Plaintiff alleged that by reason of the said collision she was seriously and permanently injured, and her injuries were particularly set out, and that by reason of said injuries it was necessary to obtain the treatment of physicians and to have hospital services and drugs, and that competent nursing was required, and by reason of her injuries she sustained damages in the sum of \$41,800.00. (Record, p. 6.)

The International & Great Northern Railway Company filed its answer in the State Court, by the second paragraph of which it pleaded that the Act of the Twenty-ninth Legislature of the State of Texas, approved March 13, 1905, which permitted a through passenger, being carried over two or more lines of railway, to sue any one or more of such carriers in any county in which any one of such carriers operated its line of railway or maintained local agents, was unconstitutional and void. (Record p. 9.) Following

the filing of this answer both defendants joined in a petition for removal to the United States District Court for the Western District of Texas. (Record, p. 11.)

At the first term of the United States District Court the plaintiff moved to remand the cause to the State Court. (Record, p. 21.) To which motion both defendants made a written reply, in which they specifically alleged and contended that the United States District Court had sole and exclusive jurisdiction to try the cause. (Record, p. 22.) The motion to remand was duly overruled (Record, p. 24); and at the same term of court the cause was continued upon the written application of both defendants.. (Record, p. 25.)

The cause was tried during the May Term, 1913, and resulted in a verdict and judgment in favor of the plaintiff against the Texas & Pacific Railway Company, in the sum of \$21,500.00, and in favor of the defendant, International & Great Northern Railway Company.

The plaintiff's evidence supported the allegations of her petition and showed that she was a through passenger without change of cars from the town of Pearsall, in Frio County, to Atlanta, in Cass County, and that she bought a through fare from Pearsall to Atlanta from the agent of the International & Great Northern Railway Company, in Pearsall, and obtained from him a ticket, or an instrument of writing, evidencing her right to be carried to Atlanta, Texas; that she was carried safely to Longview, Texas, and there received by the Texas & Pacific Railway Company, and when near the town of Atlanta on December 22, 1911, there was a violent collision of the train in which she was riding, with another train, and she was thrown out of her seat into the aisle of the car and received serious and permanent injuries; that she was taken to the home of her parents at Queen City and placed under the treatment of Dr. Strong, a practicing physician of that place. She remained under Dr. Strong's treatment until January 15, 1912, when she was taken to Dr. Dale's sanitarium, at Texarkana, remaining there until about February 1st, when she returned

to Queen City, and remained under Dr. Strong's treatment until March 24th, at which time, with the consent of Dr. Strong, she returned to her home in Pearsall, Texas. There she went under the treatment of Dr. Williamson, a practicing physician of that place, and remained under his treatment until the time of the trial. On May 27th, 1912, Dr. Williamson brought the plaintiff to San Antonio for consultation with Doctors Kingsley and Berrey, and they advised an operation. Plaintiff did not have the operation performed at this time, but returned home, and constantly growing worse, she returned to San Antonio on June 15th and was again examined by Dr. Kingsley and Dr. Williamson. She entered the hospital on June 16th, and was operated on June 17th, by Dr. B. F. Kingsley, assisted by Doctors Williamson and Kemp, and both ovaries and her appendix removed, and numerous adhesions of the internal organs were broken up.

The collision being undisputed, the court gave the jury the following charge, and three special charges requested by the defendant:

1. "In this case I charge you that the evidence has not developed any liability on the part of the defendant, International & Great Northern Railway Company, and I, therefore, charge you that you must return a verdict for this company, and proceed to consider the case against the Texas & Pacific Railway Company, under the following instructions:

2. "The evidence shows that there was a collision between two of the Texas & Pacific Railway Company's trains, and that the plaintiff was a passenger upon one of said trains. If you believe from the evidence that the plaintiff directly received any of the injuries alleged in her petition by reason of said collision, then I charge you that your verdict must be for the plaintiff in such a sum as will fairly compensate her for any such injuries as were received and as set forth and claimed by her in her petition; and, in assessing damages, you should take into consideration the reasonable expenses which the plaintiff has incurred for drugs, hospital services, and medical and surgical treatment, which

you may find were reasonably necessary in the proper treatment of any injuries which you may find she received. In estimating such damages, you will also take into consideration the mental and physical suffering, if any, which the plaintiff has undergone by reason of any such injuries; and if you find that any such injuries are permanent, you should also consider any mental and physical suffering which any such injuries will produce upon plaintiff in the future. And, if you find that any such injuries are permanent, and that they will diminish the plaintiff's capacity to labor and earn money in the future, then I charge you that this element of damages also should be considered.

3. "In this case the defendants charge that the operation and removal of the plaintiff's ovaries was unnecessary, and that the surgeon who performed said operation was guilty of mal-practice. In this connection I charge you that the plaintiff would not be responsible for the errors or mistakes of the surgeon who performed the operation, provided she used ordinary care in the selection of a reasonably competent surgeon, and did select a reasonably competent surgeon, and submitted her case to his judgment. If you find from the evidence that the plaintiff received hurts in said collision which lead to the injury and impairment of her ovaries, and if you further find that she used ordinary care in the selection of a reasonably competent surgeon, that is, such care as a person of ordinary prudence would have exercised under similar circumstances, and did employ a reasonably competent surgeon to perform said operation, and that he, acting upon his judgment, removed her ovaries, then I charge you that the defendant would be liable for the condition produced by reason of said ovaries being removed, notwithstanding some other course pursued by the surgeon might have saved the removal of her ovaries.

4. "The defendant charges that the plaintiff is malingering—that is to say, that she is not really injured as she claims to be, but is pretending to be so injured in order to recover a judgment against the defendant for damages to which she is not entitled. Whether the plaintiff was really hurt in the collision before men-

tioned, or whether she is malingering, is a question which is submitted to you to be determined from a consideration of all the facts and circumstances in evidence. Should you find that the plaintiff was not injured in said collision, then your verdict should be in favor of the Texas & Pacific Railway Company. You are the exclusive judges of the credibility of the witnesses and of the weight to be attached to their testimony, and you will give it such weight as you deem it entitled to receive under all the circumstances of the case.

5. "If your verdict be in favor of the plaintiff, you will return it in the following form: 'We, the jury, find for the plaintiff against the Texas & Pacific Railway Company, and assess her damages at ----- Dollars, (you will fill in the blank with the amount which you award her); and we further find in favor of the defendant, International & Great Northern Railway Company.'

6. "If, on the other hand, your verdict should be for the defendants, you should simply say: 'We, the jury, find for both defendants.' " (Record, pp. 44 to 47.)

Special charges given at the request of Plaintiff in Error:

"If you believe that, insofar as any injury done to the plaintiff by reason of such alleged accident, she had entirely recovered therefrom before the operation and such injuries, if any, had been entirely relieved, you will find for the defendant." (Record, p. 55.)

"If you believe that the injuries received by plaintiff were not the direct and proximate result of the railroad accident, then you will find for the defendant." (Record, p. 56.)

"I further charge you, that you will not consider any damages or any condition of the plaintiff that arose after the accident, unless you find from a preponderance of the evidence that she received such injuries in the wreck or collision of the Texas & Pacific Railway trains on the 22nd day of December, 1911, or that the said injuries followed in an unbroken sequence from the injuries there received, and were directly and proximately caused

and produced by the hurt she received in said collision, if any.”  
(Record, p. 57.)

PLAINTIFF IN ERROR'S FIRST POINT OF LAW, UNDER  
FIRST ASSIGNMENT OF ERROR.

Plaintiff in error complains that the Trial Court erred in not sustaining its plea, wherein it is set forth that the United States District Court did not have jurisdiction to try this cause, because it was improperly brought in Frio County, Texas.

A mere reference to the pleadings and to the qualification of the District Judge to the bill of exceptions will show that there is no merit whatever in this contention. The pleadings show that the International & Great Northern Railway Company pleaded that it was improperly joined, as one of the defendants, in the cause, because plaintiff's petition showed that the suit was based upon a contract for the transportation of a passenger, and that her injuries were inflicted on the line of the Texas & Pacific Railway Company, and that the Act of the Texas Legislature, approved March 13, 1905, permitting two or more connecting carriers to be sued jointly, was void and unconstitutional. (Record, p. 29.)

The Plaintiff in Error, Texas & Pacific Railway Company, pleaded as follows:

“Now comes the defendant, The Texas & Pacific Railway Company, upon whose application, joined in by the other defendant, this cause was removed from the District Court of Frio County, Texas, to this Honorable Court, and respectfully alleges *that, in case the plea in abatement heretofore filed by the other defendant herein be sustained*, that thereupon this defendant desires to here and now show to the court that, it had no agent or representative in Frio County, Texas, and that its line of railway runs from Texarkana, via Marshall, Dallas, when this cause of action accrued, nor when this suit was filed Fort Worth, Abilene, Big Springs on to El Paso, Texas, several hundred miles north of Frio County,

and that no part of its line traverses Frio County, and that action is alleged and the personal injury occasioned to have occurred in Cass County.

"Wherefore, the defendant, the Texas & Pacific Railway Company, prays that the suit abate as to it." (Record, p. 34.)

It thus appears that the Plaintiff in Error pleaded in abatement only, "In case the plea in abatement hereinbefore filed by the other defendant herein be sustained." The record does not show that the plea in abatement filed by the International & Great Northern Railway Company was sustained, but, on the contrary, the record recites as follows: "The court, having heard all pleas and all exceptions of the defendant, having considered the same and having heard the evidence thereupon, is of the opinion that none of the pleas or exceptions are well taken, and each and every one of same are hereby overruled," to which ruling of the court the defendants then and there in open court excepted. (Record, p. 59.)

As the plaintiff in error pleaded in abatement only in the event that the plea in abatement of its co-defendant was sustained, and as this plea was not sustained, the plaintiff in error had no plea in abatement. The contingency, upon the happening of which it desired the cause to abate, did not occur.

Besides, this plea does not question the right of the plaintiff to join the International & Great Northern Railway Company, or to bring the suit in Frio County, Texas, nor does it attack the validity of the act of March 13, 1905.

As a plea of privilege, claiming its privilege to be sued in the Northern District of Texas, or in any district other than the Western District of Texas, the plea is wholly insufficient. The court will notice that the plea, while it alleges that the Texas & Pacific Railway Company had no agent in Frio County, yet it does not show that the Texas & Pacific Railway Company did not have an agent or representative in the Western District of Texas, nor that its line of railway did not traverse the Western District of Texas.



In fact the Trial Court knew that the Texas & Pacific Railway Company did traverse the Western District of Texas, and that it maintained and operated its line of railway in the Western District of Texas.

The plea wholly fails to aver that the Texas & Pacific Railway Company was domiciled in the Northern District of Texas, and it does not negative the fact that it may have had its domicile in the Western District of Texas. That such a plea of privilege is insufficient is too clear for argument. In view of the peculiar allegations of this plea, we also call the court's attention to the fact that the record shows that the court heard all pleas and exceptions of the defendant, and *heard the evidence thereon*, and overruled said pleas. (Record, p. 59.)

The record does not contain any evidence which was before the Trial Court when these pleas were acted upon, and in the absence of this evidence being brought up in the proper way the Appellate Court will not revise the ruling of the Trial Court.

The Plaintiff in Error's bill of exceptions is signed by the trial judge, with this qualification:

"The suit in this cause was filed jointly against the International & Great Northern Railway Company and the Texas & Pacific Railway Company in the District Court of Frio County, Texas; the International & Great Northern Railway joined the Texas & Pacific Railway Company in an application to remove the cause from said State Court to this Court; the record in said cause was filed in this Court for the December term, 1912; at said term of this Court both defendants made a general appearance without reservation and pleaded to the merits of the cause. The plaintiff made a motion to remand the cause to the State Court. In reply to the motion to remand, which was heard at the December term of this court, defendants filed a written statement to the effect that this Court had sole jurisdiction to try the case. After the motion to remand to the State Court was overruled at the December term, defendants made an application in writing for a continuance, upon the ground that certain wit-



nesses were necessary for a proper defense on the merits of the case. This motion was granted, and the cause continued to the May term, 1913. When the cause was again called for trial at the May term, 1913, defendants for the first time offered the pleas in abatement mentioned in the bill and the pleas were overruled. A reference to the pleas will show that the defendant, Texas & Pacific Railway Company, only insisted upon its plea in abatement in event the plea in abatement offered by the International & Great Northern Railway Company was granted." Record, pp. 77 and 78.)

It is too clear for argument that when the plaintiff in error removed the cause from the State Court to the United States District Court for the Western District of Texas, it thereby invoked the jurisdiction of this court to hear and determine the cause, and it could not thereafter deny the jurisdiction which it had invoked. Upon this point the opinion of Mr. Justice Brewer in the case of *In-re Moore*, 209 U. S. Sup., 496, is conclusive. The opinion says:

"That the defendant consented to accept the jurisdiction of the United States Court is obvious. It filed a petition for removal from the State to the United States Court. No clearer expression of its acceptance of the jurisdiction of the latter court could be had. After the removal the plaintiff, instead of challenging the jurisdiction of the United States Court by a motion to remand, filed an amended petition in that court, signed a stipulation giving time to the defendant to answer, and then both parties entered into successive stipulations for a continuance of the trial in that court. Thereby the plaintiff consented to accept the jurisdiction of the United States Court, and was willing that his controversy with the defendant should be settled by a trial in that court. The mere filing of an amended petition was an appeal to that court for a trial upon the facts averred by him as they might be controverted by the defendant. And this, as we have seen, was followed by repeated recognitions of the jurisdiction of that court. \* \* \*

As we have seen in this case, the defendant applied for a removal of the case to the Federal Court. Thereby he is foreclosed from objecting to its jurisdiction. In like manner, after the removal had been ordered, the plaintiff elected to remain in that court, and he is, equally with the defendant, precluded from making objections to its jurisdiction."

If there could have been any question as to the venue of this case in the United States District Court for the Western District of Texas, the plaintiff in error waived any such question of venue by removing the cause to the District Court for the Western District, and by joining defenses to the merits with its plea in abatement; and it also waived any question of venue by alleging in its answer to the motion to remand the cause that the United States District Court for the Western District of Texas had sole and exclusive jurisdiction to try the cause; and it also waived any question of venue by appearing and presenting and having granted a written motion to continue the cause in the United States District Court, without presenting any objections to the jurisdiction of the court.

The Texas & Pacific Railway Company, being a Federal corporation, the United States District Court had jurisdiction of the subject matter of the case, as one arising under the laws of the United States, and the question of venue, the right to be sued in a particular district, was a question which could be and was waived by the acts and conduct of the plaintiff in error.

Western Loan & Savings Co. vs. B. & B. Consolidated Mining Co., 210 U. S., 368-372.

In re Moore, 209 U. S., 490-513.

Texas & Pacific Railway vs. Cox, 145 U. S., 829-832.

We think it perfectly manifest that the Plaintiff in Error, by removing the cause to the Federal Court, was precluded from challenging the jurisdiction of this court, yet it could by proper plea have set up in the Federal Court any defensive matters which it could have pleaded in the State Court. It could have pleaded

that the State Court was without jurisdiction to try the case, or that the suit was improperly brought in the District Court of Frio County, but we respectfully submit that this was not the meaning of its plea. The plea of the plaintiff in error, as we have seen, challenged the jurisdiction of the Federal Court to try the case in the event the pleas of its co-defendant were sustained, which would have left it the sole defendant in the case. The idea of the pleader evidently was that if the local or jurisdictional defendant was dismissed from the case upon its plea, then the Federal Court would not have jurisdiction over the plaintiff in error as the sole defendant. We call the court's attention to the fact that the bill of exceptions taken by the plaintiff in error shows that it treated its pleading as a plea to the jurisdiction of the Federal Court, and it recites that the court overruled its plea to the jurisdiction of said court. (Record, p. 77.) The record does not show that the plaintiff in error in any manner challenged the jurisdiction of the State Court, or the right of plaintiff to file the suit against both defendants in the District Court of Frio County.

The brief of plaintiff in error filed in this court, and also its brief filed in the Circuit Court of Appeals, contends that its plea should have been sustained because the suit was improperly brought in the District Court of Frio County. A conclusive answer to this contention is that it did not present a plea challenging the right of plaintiff to file the suit in the District Court of Frio County. The co-defendant filed such a plea, but the plaintiff in error did not. (Record pp. 29-30.) Plaintiff in error now contends by its brief in this court that the Act of March 13, 1905, Acts of the Twenty-ninth Legislature, 1905, p. 29, prescribing the venue in suits by passengers for personal injuries against connecting carriers is unconstitutional and void, and, in its brief filed in the Circuit Court of Appeals, it made the frank statement that if the statute was valid and the suit was properly filed in Frio County, then the Federal Court would have jurisdiction by reason of the removal. (Brief. p. 25.) We merely suggest to this court that this statute has been so often upheld

by the highest appellate courts in the State of Texas that its validity cannot be considered an open question.

Texas Central Ry. vs. Marrs et al., 100 Tex., 530.

M., K. & T. Ry. vs. Blanks (Tex. Sup.), 125 S. W. Rep., 312.

S. L. & S. W. Ry. vs. Wester, 96 S. W. Rep., 769-772.

S. L. & S. F. Ry. vs. Sizemore, 116 S. W. Rep., 403.

The plaintiff in error, in its brief in this Court, page 33, has quoted at length from the decision of the Texas Supreme Court in the case of Railway vs. Blanks, 125 S. W. Rep., 313, and this quotation clearly shows that the Supreme Court of Texas held this Act of the Legislature to be valid, and held that it gave the injured passenger the right to sue any one or all of the connecting carriers in any county in which either of such carriers operated its road, or did business, or had an agent or representative.

It is the settled law that the local law of a State is taken by the Supreme Court of the United States, as announced by the State Court of last resort.

Clarke vs. Clarke, 178 U. S., 186.

Abraham vs. Casey, 179 U. S., 218.

“Where the construction given by the highest court of the State to the constitution or statute of a State has been uniform and is settled, it is binding on the Courts of the United States as a rule of decision.” Darlington vs. Jackson County, 101 U. S., 688.

We feel that the reference of plaintiff in error to the several Acts of the Texas Legislature prescribing venue is not as clear as it should be. The Venue Act of May 20, 1899, Acts Twenty-sixth Legislature, p. 214, fixed the venue in suits against connecting carriers for loss or damage to freight or baggage, and did not include personal injuries sustained by passengers. This Act was construed to have no application to injuries sustained by passengers in the case of Texas & Pacific Ry. vs. Lynch, 97 Tex., 25, cited by counsel for plaintiff in error, on page 29 of its brief,

and therefore the statute was amended by the Act of March 13, 1905, expressly to include personal injuries sustained by passengers. This statute has been construed in the cases we have cited to be valid exercise of the State's power to prescribe the venue in civil actions, and that it fixed the venue in suits for personal injuries by passengers against connecting carriers in any county in which one of such carriers operated its road, or had local agents or representatives.

The Act of 1901, Acts Twenty-seventh Legislature, page 31, referred to on page 26 of plaintiff in error's brief, is a general venue statute fixing the venue in suits for personal injuries either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury, provided the defendant corporation operated its road in such county, or had an agent or representative in such county.

When the Legislature in 1905 desired to prescribe a particular venue for suits by passengers against connecting carriers, it was not necessary that the legislative act should amend the general venue law of 1901. In fact, it was not necessary that the legislative act should be amendatory of any particular existing act. It could have passed an independent act, merely prescribing the venue in suits by passengers against connecting carriers, without reference to any prior legislation fixing venue in such cases. If the Act of 1905 conflicts with the prior venue law of 1901, it forms no objection to the validity of the later act. The later act simply controls, and insofar as there may be a conflict, the earlier act must yield to the later. It is needless to suggest that the State Legislature has entire control of the subject of fixing venue in suits in the State courts, and this Act of 1905 has been so explicitly upheld by the State Supreme Court that its validity is not now an open question.

We beg further to suggest to the Court that, entirely independent of the venue statute of 1905, the suit was properly filed in the District Court of Frio County, Texas, under the general venue law, which is set out on page 26 of the brief of plaintiff

in error. This is a general venue statute, and provides that any suit for personal injuries may be brought in any county in which the plaintiff resides, or in any county through which the defendant's line of railway extends, or in which the defendant maintains a local representative. It is entirely undisputed that the International & Great Northern Railway extended through Frio County, Texas, and maintained local agents in that county, and that the plaintiff also resided in Frio County, Texas. It is quite elementary, and the venue statutes of Texas so provide, that a suit against two or more defendants may be brought in any county in which one or more of the defendants resides. It is too clear for argument that the International & Great Northern Railway Company, with its road extending through Frio County, and having representatives within the county, could not complain that the suit was filed in Frio County. The plaintiff had the right to join the Texas & Pacific Railway Company in this suit, because she was a through passenger, having a contract for transportation through to her destination, and received injuries upon the line of the Texas & Pacific Railway Company while she was a passenger under such contract of transportation. Our courts have often held that upon a through contract for transportation, without any limitation of liability, the initial carrier, as well as the carrier upon whose line the injury occurred, is liable to the injured passenger. The case of the Texas Central Railway vs. Marrs, 101 S. W. Rep., 1177, directly holds the initial carrier liable for an injury sustained on the line of a connecting carrier, where there was a joint or through contract of carriage. The same is held in the following cases:

Texas & Pacific Ry. vs. Lynch, 97 Tex., 25.

Blanks vs. M., K. & T. Ry., 116 S. W. Rep., 377.

El Paso & N. E. Ry. vs. Landon, 124 S. W. Rep., 744.

The brief of plaintiff in error, page 32, quotes from the Landon case, as follows:



"The Court's charge, in effect, assumed the liability of all of the defendants for the negligence of any one of them resulting in the injury of the passenger while traveling on any of said lines on said ticket. This we think was correct. *Railway vs. Lynch*, 97 Tex., 25; 75 S. W. Rep., 486; *Banks vs. Railway*, 116 S. W. Rep., 377. And we therefore overrule all the propositions in appellant's brief which assert that, the injury occurring on the line of one of these defendants, the others were not equally responsible."

It is thus clear that the plaintiff had the right to sue both connecting carriers, and to bring the suit in Frio County, Texas, because the plaintiff resided in Frio County, and one of the defendants operated its line of railway through Frio County and maintained representatives there. The right of the plaintiff below to sue the International & Great Northern Railway in Frio County cannot be seriously questioned. This gave the State Court jurisdiction of the case, and it will be noticed that the Texas & Pacific Railway did not plead that it was improperly joined in the suit.

PLAINTIFF IN ERROR'S SECOND POINT OF LAW, UNDER  
ITS SECOND ASSIGNMENT OF ERROR.

Plaintiff in error here complains that the trial court erred in excusing the jurors, Vance and Lentz, because they had prejudice against personal injury damage suits. \*

A conclusive answer to this contention is that plaintiff in error does not show that a fair and impartial jury was not selected to try its case, and its bill of exception does not show that it exhausted its peremptory challenges or that any objectionable juror was forced upon it. It does not appear that the two jurors who took the places of those excused were unfair or in any way objectionable. (Record, pp. 79-86.)

Plaintiff in error's bill of exception does not show how many names were on the jury list, or the order in which the names

of Vance and Lentz appeared, or that these two jurors would have been drawn on the jury panel had they not been excused. It merely shows that the two jurors were excused by the court on account of prejudice. (Record, p. 86.) The complaining party must not only show that the trial court abused its discretion in setting aside the jurors, but it must also show that such error resulted in unfair or prejudiced jurors being forced upon it.

Couts vs. Neer, 70 Tex., 468-473.

Northern Pacific Ry. vs. Herbut, 116 U. S., 642.

S. P. Ry. vs. Rauh, 49 Fed. Rep., 702.

Plaintiff in error's presentation of this matter is not complete, for while its brief copies a large part of the examination of the jurors, as shown by the stenographer's report, yet its brief does not call this Court's attention to the fact that the stenographer's report did not include all of the testimony of these jurors, and the qualification of the trial judge appended to plaintiff in error's bill of exceptions show this fact, and shows that these jurors testified that they had prejudice against personal injury litigation which would go with them into the jury box, and that their verdict might be affected by such feeling.

We beg to call the Court's attention to the fact that plaintiff in error's bill of exceptions No. 2 contains this explanation made by the official stenographer: "I beg to advise that the examination contained in said bill is all that I have on the subject. I was not requested to report any of such examination previous to that contained in said bill." (Record, pp. 78-79.) The trial judge signed the bill of exceptions, with the following qualification:

"This bill No. 2 is approved with the qualification that the stenographer certifies that he did not take down all of the testimony of the Jurors Vance and Lentz, and, in addition to the testimony shown by this bill, both of said jurors gave evidence tending to show that they had some prejudice against personal injury litigation, and that this prejudice would go with them



into the jury box, and would require evidence to remove it, and that their verdict might be affected by such feeling." (Record, p. 86.)

This qualification is agreed to by counsel for plaintiff in error. (Record, p. 86.)

We take it from the brief of plaintiff in error that it does not seriously contend that when jurors testify that they have a prejudice against personal injury litigation, and that this prejudice would go with them into the jury box and would require evidence to remove it, and that their verdict might be affected by such feeling, that the trial judge has no discretion to set aside such jurors. It has been the uniform practice of the courts of the United States to allow to the trial judge a wide discretion in setting aside jurors when the examination before him revealed the existence of bias or prejudice, which might affect their perfect impartiality as jurors. In the early case of *Mima Queen vs. Hepburn*, 7th Cranch, 290-297, Chief Justice Marshall expresses the view of the court, as follows:

"It is certainly much to be desired that jurors should enter upon their duties with minds entirely free from every prejudice. Perhaps on general and public questions it is scarcely possible to avoid receiving some prepossessions, and where a private right depends on such a question, the difficulty of obtaining jurors whose minds are entirely uninfluenced by opinions previously formed is undoubtedly considerable. Yet they ought to be superior to every exception, they ought to stand perfectly indifferent between the parties, and although the bias which was acknowledged in this case might not perhaps have been so strong as to render it positively improper to allow the juror to be sworn on the jury, yet it was desirable to submit the case to those who felt no bias either way; and, therefore, the court exercised a sound discretion in not permitting him to be sworn."

In addition to this, it is too clear for argument that the court will not review the ruling of the trial court upon a fact

finding when the Record discloses that all of the evidence on the subject is not brought up with the Record.

In the remarks under this assignment, counsel for plaintiff in error refer to some affidavits procured from some of the jurors showing that when the jury retired to consider its verdict, one of them, Mr. E. D. Thomas, took a paper from his pocket and said he had some data to facilitate the jury in considering the case, and also showing that they were influenced by Miss Hill's testimony about Dr. Dale. The conduct of Mr. Thomas was perfectly proper, for he explains in his affidavit that in the paper referred to, he had noted the issues in the case to be considered by the jury and he states what these issues were, and that they fairly comprehended the case, and would not have retarded an orderly consideration of the case is clear beyond dispute. (Record, p. 333.)

While we fail to see that these affidavits are relevant to any point made by plaintiff in error, yet its counsel must know that it is not competent to prove, by affidavits of jurors, any bias or prejudice of the jurors, or any motives or influences which affected their deliberations.

Woodward vs. Leavitt, 107 Mass., 453. The opinion in the above case is cited with approval in the case of Mattox vs. United States, 146 U. S., 140-153.

#### PLAINTIFF IN ERROR'S THIRD POINT OF LAW, UNDER THIRD ASSIGNMENT OF ERROR.

This proposition contends that the trial court committed error in declining to continue or to postpone the cause during the progress of the trial in order to permit defendants to secure testimony to contradict the plaintiff, Miss Hill, and to show the high character and standing of Dr. Dale.

It is the settled law in the United States Courts that the continuance of a case, or the refusal to postpone or continue rests in the sound discretion of the court in which the motion is made, and will not be reviewed on writ of error.

Burrow vs. Hill, 13 How., 54.

Sims vs. Hundley, 6 How., 16.

Thompson vs. Selden, 93 U. S., 291.

T. & P. Ry. vs. Nelson, 50 Fed., 815.

The proposition submitted by plaintiff in error cannot be sustained for the conclusive reason that the defendants in the court below did not ask that the case be continued or postponed to meet the testimony of the plaintiff, Miss Hill. The record conclusively shows that their witness, Dr. Dale, was being interrogated on the subject of having taken some liberty with Miss Hill, while she was in his sanitarium, and it was then that the defendants asked that the case be postponed, in order to secure testimony *to show the high character and standing of Dr. Dale* (their witness), and subsequently when Miss Hill testified on this subject the defendants neither objected to such testimony, nor did they then ask that the case be continued or postponed to give them time to procure testimony to contradict Miss Hill.

Plaintiff in error's bill of exception No. 3, record page 87, shows that Dr. Dale was asked the following questions:

"Q. Did you put your arm around her in the presence of the nurses?

A. If I did, I intended to quiet her.

Judge Cobbs: Anything of that sort occur?

Doctor Dale: No, sir, I make in a rule never to examine patients except in the presence of the nurses. In fact, bring them to my office for that purpose and prepare them for that purpose.

The Witness: There may be some of my people here, or you can telegraph to Arkadelphia or Texarkana, or anybody.

Judge Cobbs: We want to ask, in view of the suggestions being made here against Dr. Dale, that this case be postponed until we can secure the depositions of witnesses from Texarkana to establish his standing and character.

The Court: What do you say, Mr. Carter?

Mr. Carter: No evidence of that kind would be admissible if it was here.

Judge Cobbs: We ask them to prepare an application setting up the facts so that we can have an opportunity to have witnesses here to show the character of the man; to show that he is a man that wouldn't be guilty of anything of that sort.

The Court: I can't postpone the case any further.

Judge Cobbs: You will give us time to prepare that motion?

The Court: You may just consider it in." (Record, p. 88.)

The bill of exceptions further shows that thereafter, in obedience to the understanding had, a written motion to continue or postpone was prepared and filed (Record, page 89), and the trial judge signed the bill of exceptions, with the following qualification:

"This bill No. 3 is signed with the qualification that the written motion copied in the bill was not read by the court or to the court, and was not presented to or read by counsel for plaintiff. When the court ruled upon the motion to postpone, it was just after Dr. Dale had denied taking any improper liberties with the plaintiff. The court was not called upon to rule upon the question of postponement after the plaintiff had testified in rebuttal. While it was agreed that the counsel for the defendant could put in writing the motion that was orally made, it was not contemplated that the written motion should be in any wise different from the oral motion which had been overruled. The court does not concur in the conclusions or arguments which are made in the written motion, and the issue should be confined to the state of the case which existed at the time the ruling of the court was actually invoked, and when the ruling was actually made. The only time any ruling of the court was invoked or exception taken was just after Dr. Dale denied upon cross-examination that he had taken any improper liberties with the plaintiff, and no ruling of the court was invoked after the plaintiff went upon the stand in rebuttal. There was no objection to any of the testimony upon the subject mentioned

in this bill and no motion to strike it out, and no definite period of postponement suggested. One witness, at least, Mr. Chew, gave testimony at the trial in regard to Dr. Dale's high character." (Record, pages 99-100.)

It is too clear for argument that the trial court cannot be put in error for declining to postpone the case to give time to secure testimony to contradict the statement of the plaintiff when no such motion was presented to the trial court. The record conclusively shows that at the time the defendants made the motion to postpone the cause their witness, Dr. Dale, was testifying, and the plaintiff, Miss Hill, had not yet testified on this subject. The motion to postpone being made while Dr. Dale was still on the stand as a witness, its purport was to secure additional testimony to support the high character and standing of Dr. Dale. This motion the court refused. Miss Hill had not then testified on this subject, and, of course, it could not have been anticipated that the defendants would want testimony to contradict Miss Hill when she had not yet testified. The bill of exceptions shows that she did testify later, and that defendants did not renew their motion to postpone or continue, and did not even make the suggestion to the court that they desired further testimony to contradict the statement of Miss Hill. The record shows that the defendants did not object to any of this testimony and did not in any way seek to have it excluded from the jury. Whether or not a trial court will postpone or continue a case under such circumstances always rests in the sound discretion of the trial judge, and this discretion will not be reviewed in a Federal Court.

That there is nothing in the testimony to reflect on Dr. Dale is clearly shown by the specific answers made; Dr. Dale, himself, testified:

"Q. Did you put your arm around her in the presence of the nurses?

A. If I did, I intended to quiet her." (Record, page 88.)

Miss Hill's statement was to the effect that Dr. Dale on the

occasion of one examination put his arms around her and loved her "just like I was a baby." (Record, page 94.)

After this testimony, Dr. Dale was again put on the stand and asked if he had any improper motive towards the young lady, and he answered: "None, whatever. She is a sick, nervous, hysterical girl, and this examination, I made a note of her staying a week there afterwards, or ten days. Absolutely, of course, I didn't. I would not be called upon to defend a reputation of that kind. She was a nervous, sick woman, a girl, quite a child." (Record, page 98.)

The record shows that later in the testimony defendant's witness, W. L. Chew, testified to the high character and standing of Dr. Dale, as follows:

"I guess I have known Dr. Dale, who testified here, 10 or 12 or 15 years. He stands very high, both in the community in which he lives, and all over the Union; and I do not think there is a man in the country that stands higher than he as a surgeon and physician. I know his personal and moral reputation, and it is certainly as good as any man's in the world." (Record, page 261.)

Dr. Strong also testified: "Dr. Dale is a very successful surgeon and practitioner and I usually carry my patients to him for operations. I know that Dr. Dale is regarded very high by the profession." (Record, page 212.)

There was no further testimony on the subject, and we submit that it would have been very unusual for the trial court to have continued or postponed the case to permit the procuring of further testimony as to the character and standing of Dr. Dale. Plaintiff in error's own estimate of this testimony is shown by the following quotation taken from its brief filed in the Circuit Court of Appeals, at page 38: "In fact no man of ordinary reason would think a man like Dr. Dale would be guilty of improper conduct with the then sick, vomiting girl." If no one would have thought Dr. Dale guilty of improper conduct, then there certainly was no reason to continue the case to secure further testimony of his



good character, and the discretion of the trial court was not abused.

We regret to note that in its remarks under this assignment (Brief, pages 47 to 50) plaintiff in error seems to question the verity of the facts stated in the qualification to its bill of exceptions, and indulges in some unjust criticisms of the distinguished trial judge who presided at this trial. Plaintiff in error says that the qualification signed by the court "is in the direct face of the Record" (Brief, page 47), and counsel add: "We were not permitted to complete oral motion, which we would have dictated had we been given the opportunity, but pursued the only course left us, to thereafter put in writing, file and present the very day. There was no attempt on our part to say what would be in our motion, for Judge Maxey, as will be seen, did not even allow us to finish the sentence. We should have proceeded and dictated the motion but for the impatience of the court at the time, and we plead for time to prepare the motion, which was given us, but with an emphasis by the court, who said "You may just consider it in." (Brief, page 49.) Of course counsel must know that the facts stated by the court in signing a bill of exceptions, having occurred in the court room and in his presence imply verity, and will be taken by this court as true. The record, however, bears out each fact stated by the trial judge, and does not even remotely warrant any of the criticisms made by counsel.

We call the court's attention to the fact that the record shows that the motion to postpone was made while defendant's witness, Dr. Dale, was on the witness stand, and the bill of exceptions contains the questions and answers and all of the statements made by the court and counsel in the exact order in which they occurred. (Record, pages 87 and 88.) This bill shows that while Dr. Dale was on the witness stand under cross examination counsel for plaintiff in error made his oral motion as follows:

"Judge Cobbs: We want to ask, in view of the suggestions being made here against Dr. Dale, that this case be postponed until we can secure the depositions of witnesses from Texarkana to establish his standing and character.

The court then asked plaintiff's attorney 'What do you say Mr. Carter?' Mr. Carter replied: 'No evidence of that kind would be admissible if it were here.'

Judge Cobbs: We ask then to prepare an application setting up the facts so that we can have an opportunity to have witnesses here to show the character of the man, to show that he is a man who would not be guilty of anything of that sort."

The court ruled: 'I cannot postpone the case any further.'

Judge Cobbs: You will give us time to prepare *that* motion?

The Court: You may consider it in.

Mr. Carter: Yes, sir, consider it in." (Record, page 88.)

The bill of exceptions then recites that thereafter the said motion was in all things prepared and presented to the court (Record, page 89), but when the written motion, which was filed thereafter, is looked to, it is found to be an entirely different motion from that presented orally to the judge and which defendant asked time to reduce to writing. The written motion shows that the postponement was asked on account of the testimony of Miss Hill, and to give time to secure testimony tending to contradict her statement, as well as to show the character and standing of Dr. Dale. The written motion is not by any means the same as the oral motion presented to and acted upon by the court, and we submit that the facts certified to by the trial judge are absolutely verified by the record. The record contains no suggestion that the trial judge was impatient with counsel or that he declined to hear him fully or to give him time to reduce his oral motion to writing, but the record does show what his oral motion was, when it was made and how it was ruled upon by the court, and that his written motion, prepared and filed at a later date, was materially variant from his oral motion and was based upon facts and happenings which had not transpired when the oral motion was made and when the court ruled.



PLAINTIFF IN ERROR'S FOURTH POINT OF LAW, UNDER  
ITS FOURTH ASSIGNMENT OF ERROR.

This proposition contends that the trial court should have given a peremptory instruction to find for the defendant, on the theory that plaintiff's injuries were not the direct and proximate result of the collision.

It will be noticed by the court that the requested charge is rather ambiguous, and certainly is not clear in its meaning. The charge reads as follows:

"You are instructed that under the evidence you will find a verdict for the defendant, because such injuries as plaintiff sues for could not be and were not the direct and proximate *cause* of the collision and shock, if any, to plaintiff." (Record, page 54.)

Of course there were two defendants in the case at the time this charge was requested, and it does not at all appear in behalf of which defendant the charge is requested, nor in favor of which defendant a verdict was to be instructed. This ambiguity is emphasized by the fact that a verdict in favor of the International & Great Northern Railway was instructed by the court and the trial court should not be held in error for refusing to instruct a verdict in favor of the Texas & Pacific Railway, when such an instruction was not specifically asked. Again, the requested instruction would have told the jury that plaintiff's injuries "Could not be and were not the direct and proximate *cause* of the collision and shock to the plaintiff." It would scarcely be contended that plaintiff's injuries were the proximate cause either of the collision or the shock, but rather they were the direct result of the collision.

However, if the requested charge be treated as a request for a peremptory instruction in favor of the defendant, Texas & Pacific Railway, it is perfectly manifest that such an instruction could not have been given. That plaintiff was a passenger at

the time the collision occurred is wholly undisputed; that the train upon which she was a passenger ran through a misplaced switch and into a sidetrack and came in violent collision with another passenger train, with sufficient force to demolish both engines, is practically undisputed. There is evidence tending to show that by reason of such collision plaintiff received serious and permanent injuries, and therefore the question of whether she was injured by reason of the collision was one for the jury.

We will not attempt to state all of the evidence relating to plaintiff's injuries, nor all of the evidence which tends to show that her injuries resulted from the collision, for this would unnecessarily consume the time of this Court. If there was any evidence reasonably tending to show that the plaintiff was injured and that her injuries resulted from the collision, then the case could not be withdrawn from the jury. Plaintiff pleaded that by reason of the collision of the two trains she was seriously and permanently injured, and enumerated the particular injuries. (Record, page 5.)

The plaintiff testified as follows:

"When we arrived at a station called Kildare our train ran into an open switch and into another train. Both trains were passenger trains, and when they ran together there was a great shock to us all, and I was thrown out of my seat and was knocked unconscious. I was thrown forward and against the lower part of the seat. I fell forward on my side underneath the chair in the aisle; in the aisle and up against side of the seat. Several persons, probably three or four, fell on me. My sister was also thrown; and quite a number of people were thrown out of their seats. My sister helped me and I got back upon my seat. A man came through the train and told us to keep our seats, that nothing had happened, and he took hold of my sister's arm and told her to sit down that nothing had happened, and she replied that something had happened. In about an hour a trainman came through the car and asked us our names, and he looked at me

and asked what was the matter with me and I replied that I was sick, and he said that I was scared; to which I replied "probably I am," and he went on. I had only about fourteen miles further to go to get home, and in the mean time I begun to get stiff. My father met us at Atlanta and took me home and I went right to bed. I never felt any numbness until the next day, and after the numbness left me the pain came on and I suffered for quite a while before I was relieved. I felt sick at my stomach and could not retain food or water. The nausea first appeared when I got home, but it was not as bad as the next day, but I had no appetite. I had a bruise on my back and one, two or three on my left side. There were two on my hips and legs. Immediately after the wreck I sat up in the seat of the car. At that time I felt nervous and weak. I had a kind of numb feeling and I did not realize at first that I was hurt. I thought, as the trainmen did, that I was scared. When I arrived home I thought I would be all right in the morning; but when morning came I was a little worse. The symptoms of nausea began the morning after the collision, and I kept vomiting off and on from that time until I was taken to Texarkana on the 15th of January. I noticed that the mirror in the side of the car I was in at the time of the wreck was crushed as if some one had taken a hammer and crushed it. There was the mirror set in the wall of the car. About an hour or more after the wreck occurred my sister went out and looked at the wreck and came back and told me about it, and as I had never seen anything like it before, and as I thought the fresh air would help me, I went out and looked at the wreck. The engines had gone together and rebounded back and were standing apart. Both engines were demolished. I think we were at the place of the wreck for two hours or more before we were carried on. We were carried on in the same car we had traveled in, but we had a new engine. Atlanta, Texas, was the place I had bought my ticket to. When we arrived at Atlanta my father met us there. When I arrived there I began to get stiff and numb, and

I was taken to a restaurant and I remained there probably an hour before I was taken to Queen City. While at Atlanta they bathed my face and gave me some water. On account of the wreck I had no breakfast. The hack was brought to Atlanta and either my father or my sister helped me into it and I was carried home. I had to ride in the hack about two and a half or three miles from Atlanta to Queen City. When I arrived home I felt nauseated and numb. A nice dinner had been prepared for us, and I went to the table when I arrived home and looked at it; but it seemed like the sight of the table made me sick. Then a bed was prepared for me and I removed my clothes and retired. It was about 1 o'clock when I got to bed and I remained in bed all day. That was Friday, I think. I had no doctor that day, but I sent for a doctor the next morning. Dr. Strong came to see me the next morning. He is in attendance on the trial of this case. When he came he prescribed for me. His medicine seemed to help me at the time. He left some little tablets for me to take, and about 6 o'clock that evening another tablet was sent me, and I had hardly swallowed it before this numbness left me and the pain came, and my mother thought that the medicine had brought the pain on, but I told her that I had hardly swallowed the medicine before the pain struck me. The pain drew my face and every part of my body seemed to draw. We called for Dr. Strong, but he was out in the country and we could not get him, and then we called for Dr. Roach of Queen City. He did all he could for me at the time. About 10 or 11 o'clock Dr. Roach was called to see another patient. Dr. Strong had come in the meantime and I was made easy and went to sleep, and I think it was the next morning about 10 o'clock when another spell came on me, and I had still another spell at 2 o'clock that night. I suffered as I did at first, but not as much, and the doctor came and gave me more medicine and finally got me easy. I went to the sanitarium at Texarkana on the 15th of January. From the 22nd of December until the 15th of January I was not in bed all the time, but was up and

down. When I first got up my mother placed pillows in a chair and I sat up that way, and I walked a little, and I think once Dr. Strong sent his buggy for me and I spent the day at his house. That was before I went to Texarkana. The nausea was more or less all the time. The doctor allowed me to eat soft foods, such as soup. I had no appetite to speak of. Dr. Strong finally told my father that he had done all he could for me, and he thought it best to take me to Texarkana. I was placed on a cot and several men came to the house and took the cot and carried me to the depot. The cot was placed in the baggage car and I was taken to Texarkana, 21 miles away." (Record, pages 108 to 111.)

Plaintiff further testified:

"The first time he made an examination of me, Dr. Williamson remarked that there would have to be something done, and he asked me if I could come back the next morning. I went back the next morning, and he made a thorough examination and saw that an operation was necessary. He thought an operation was necessary. He said that I need not take his word for it, but that he would bring me to San Antonio and I could go to any doctor in San Antonio I wished. I thought the matter over, and after that I got down again and was down quite awhile. I did not want to have an operation performed, because an operation was something that frightened me. But I got down and it seemed as if I was down to stay. Dr. Williamson came to see me one morning and I told him that if nothing but an operation would help me that I was willing for it. He then said he would take me to San Antonio and see what the doctors there said. I was then brought to San Antonio and examined by Dr. Berrey, city physician, and Dr. Kingsley and also Dr. Stout, and they thought the operation was necessary. I then went back home again. The trip to San Antonio made me sick and I went to bed when I got back to Pearsall and was not out any more. I remained in bed seven days from the trip. Then I was brought back a second time and another examination was made of me.

Dr. Kingsley and Dr. Williamson made the second examination. In reply to the charge made in the defendant's answer that I am malingering, all I have to say is that from the time I was hurt I felt this awful pain in my hip and back, and it has gradually gotten worse. I am not putting on a thing, but have been just as simple and plain as I could be. I brought this suit about eight months after the accident. That is what the record shows. My health before the accident was excellent. Before the accident I had no medical treatment to speak of." (Record, pages 112 and 113.)

She further said:

"It was only after the accident that these troubles developed. If there was anything the matter with my back before the accident I never knew of it. I can feel that there is a curvature to my spine at the present time. I can discern that curvature myself. One of my hips is much higher than the other, and I cannot bear to stand any length of time or to walk, an account of the pain. It is my left hip that pains me and its condition is visible by looking at it when the clothing is removed. The condition of the left hip was all right before the accident and I never suffered with it. My back was also all right before the accident. At the time of the accident I felt that something was wrong with my back and hip; but I thought I would overcome it and that it would pass away, but instead it seems to me to get weaker all the time." (Record, pages 114 and 115.)

Dr. Redditt, who was the family physician in Miss Hill's family, testified:

"Prior to the accident the plaintiff was a stout, robust girl, capable of undergoing a great deal of hardship and doing a great deal of work. I have not examined plaintiff since the accident, but I have noticed her, and she seems lighter in weight and can scarcely get about, and has a pale, anemic look." (Record, page 107.)

Dr. Williamson testified as follows:



"I commenced about April, 1912, and she has been under my treatment ever since that time. When she first came to me I found that she was suffering from a deformity of the hip, also pains in the hip. Afterwards I discovered curvature of the spinal column and afterwards found her suffering from appendicitis and female trouble. Then afterwards I found an operation necessary. After operating I found she had appendicitis and adhesions, and both ovaries were cystic, and it was necessary to remove them. I gave the plaintiff the proper treatment as I saw for the symptoms as they arose. I treated her for appendicitis and female trouble. I was present at the time of the operation on Miss Hill. The operation was for the purpose of removing the ovaries and appendix. The operation was performed by the advice of myself and Dr. Kingsley. After the operation I found she had appendicitis and cystic ovaries. After the operation a speedy recovery was secured. The conditions revealed by the operation were appendicitis, cystic ovaries and adhesions. At the time and just preceding the operation, the plaintiff's condition was very bad and she was suffering a great deal, and it was necessary to perform the operation to save her life. The result of the operation proved satisfactory, and the plaintiff recovered thereafter. The plaintiff was unsexed as a result of the operation, and will be barren all her life, and can never raise a family. The injury to plaintiff's hip is a permanent injury. She can get around, but it will always be a hindrance to her. In my opinion the plaintiff will be an invalid for life, and she will not be able to perform manual labor or to engage in regular work. The plaintiff is very nervous and will always be in that condition. In my opinion the condition of the plaintiff was caused by traumatism. Traumatism, shock or violence could produce the conditions I found in Miss Hill, the plaintiff." (Record, pages 170 and 171.)

Dr. Kingsley testified as follows:

"My name is B. F. Kingsley. I am a physician and surgeon. I have been practicing my profession 39 years. I am a graduate

of Detroit Medical College and the Long Island Medical Hospital. I remember performing an operation upon the plaintiff herein. It is not true, as charged by the Texas & Pacific Railway Company, that I was guilty of malpractice in performing that operation upon the plaintiff. I have been practicing medicine in San Antonio about 35 years. I have held the position of consulting surgeon for the Southern Pacific Railroad. I held that position a couple years several years ago. On the 27th day of May, 1912, I was in consultation with Dr. Williamson and Dr. Berrey. I examined the plaintiff very carefully. We observed in the out-start of the examination that the facial expressions of the plaintiff was that of severe pain. She had a pale enemic appearance and was very nervous and there was a general muscular tremor. Upon examining her further I found her pulse was 120 and her temperature was 102 and 102 2-10ths. Normal pulse is about 75, and normal temperature is 98½. The pulse was quite irregular, showing an irritable condition of the vessels and heart, though I saw no evidence of organic heart trouble. Examining her further I found a soreness, on pressure, over the lower portion of the spine and an inability to stand at that time, especially with her eyes closed. In fact her condition at that time was so critical that it was impossible to get her on her feet to make certain tests we desired to make. I also instituted a general examination and a digital rectan and vaginal examination, and found her ovaries enlarged and the womb displaced, and one of the ovaries displaced, and very great tenderness around the region of the womb, so much so that the slightest pressure would cause her to cry in pain. I also found a soreness over the abdominal region, especially over the sides and over the region of the ovaries. That was the general condition that I found her in at that time. There was some portions of the examination that we could not make at that time, owing to the plaintiff's condition, and I had an engagement to meet Dr. Berrey the next morning. So the next morning I had occasion to confirm the view I had made the day previous and I then advised an operation. I did not perform



an operation at that time, but I advised it. The plaintiff came back on the 15th of the following month and was sent to the hospital on the 16th and was operated on on the 17th. I found a condition of general inflammation throughout the pelvic and lower abdominal tissues. The ovaries were enlarged and bound together by adhesive bands or adhesions as a result of the inflammatory condition. These adhesions were of comparatively recent origin as evidenced by the ease with which they were broken up and overcome. The ovaries were removed and it was necessary to remove the entire appendages, both ovaries and the tubes, on account of the conditions they were in. It was necessary to remove the appendix also, as it was involved in the inflammatory process and bound down by adhesive conditions, which are recognized by those of authority as necessitating operations of that kind always. The plaintiff went through the operation as well as the average patient does in that condition and did about as well after the operation as patients usually do. In fact, she left the hospital in a couple of weeks, and afterwards I understand, had a collapse at home, which I understand, was the result of acute constipation or obstruction of the bowels or something of that kind. But as soon as that condition was overcome her condition was relieved and she has been doing fairly well ever since. She has her ups and downs, and attacks of nervousness and I have seen her quite a number of times since then and have never found her without some fever and more or less nervous and unable to sleep, with indigestion which is worse at times than it is at others. The removal of both of a woman's ovaries, as was done in plaintiff's case, unsexes a woman. I also removed plaintiff's appendix. What I did was absolutely necessary by reason of the conditions I found. I make a specialty of such operations as was performed on the plaintiff. If the operation had not been performed as it was I think the plaintiff would have been dead by this time, and it was a question of saving her life. I do not think that the plaintiff, in her present condition, is fit for any mental or physical work. She had fever yesterday and has

had fever within the last few days. I examined the plaintiff's back and found that the left hip is lifted probably three-quarters of an inch above the other, and a shortening of the right leg something like three-fourths of an inch. The lower dorsal vertebra is deflected to the right at least half or three-quarters of an inch, and it was over that region she has complained of soreness all this time." (Record, pages 131 to 134.)

Without taking the time to copy the evidence here, we beg to call the court's attention to the fact that the evidence of Miss Hill's physical injuries is further corroborated by the testimony of Dr. Kemp (Record, page 162), and also by the testimony of Dr. Berrey. (Record, page 261.)

Dr. Berrey summarizes the injuries to Miss Hill's hip and spine as follows:

"The trouble to plaintiff's spine is very apparent, anybody can see it, and by actual measurement the left hip is an inch higher than the right and the condition of the spine is very apparent. It would be physically impossible to put on that condition, and malingering would have no effect one way or the other. I regard the condition of her back and hip as serious, and they are permanent and will be there always. If those conditions were not present when plaintiff got on the train and developed afterwards, I would not know what else to attribute them to except the wreck. As far as the ovarian troubles are concerned they might develop slowly. As far as the adhesions are concerned, they are the result of inflammation, and they come on gradually, and the greater length of time they exist the stronger they become." (Record, pages 263 and 264.)

We think it needless to consume the further time of this Court in showing that the evidence tends strongly to show that the plaintiff received serious and permanent injuries by reason of the railway collision, and that therefore a peremptory instruction in favor of the defendant could not have been given.

PLAINTIFF IN ERROR'S FIFTH POINT OF LAW, UNDER  
ITS FIFTH ASSIGNMENT OF ERROR.

This proposition contends that when the trial court instructed a verdict in favor of the co-defendant, International & Great Northern Railway, it should likewise have instructed a verdict in favor of the remaining defendant, Texas & Pacific Railway Company, on the ground that it had no jurisdiction to hear and determine the cause as to the Texas & Pacific Railway.

Plaintiff in error refers this court to its first point of law, under its first assignment of error, which raises the question of venue, and says (Brief, page 91) that the question here raised is the same as is presented under its first point of law.

We fail to see any force in the contention of plaintiff in error to the effect that when the court heard and determined the case as to the defendant, International & Great Northern Railway Company, and concluded that there was no liability shown, that then and thereby it lost jurisdiction over the co-defendant, Texas & Pacific Railway Company. This proposition is manifestly unsound, because there is no question of jurisdiction involved. The Federal Court clearly had jurisdiction over the subject matter of the litigation and over the parties, and the only question that plaintiff in error seeks to present is one of venue—its right to be sued in the Northern District of Texas. It is settled beyond controversy that venue is a personal privilege, which may be waived, and the defendant, Texas & Pacific Railway Company, consented to have the case tried in the Federal Court by several most conclusive acts: 1st. It removed the case from the State Court to the District Court for the Western District of Texas (Record, page 11); 2nd. It filed its pleas pleading its defenses to the merits of the case; (Record, page 33); 3rd. It resisted by a written pleading plaintiff's motion to remand the case to the State Court, and asserted in writting that the District Court for the Western District of Texas had the sole and exclusive jurisdiction to try this cause (Record, page 22); 4th. It ap-

peared and presented a written motion for a continuance of the case on account of the absence of testimony material to its defenses (Record, page 25); 5th. It pleaded to the venue of the court only in the event the pleas in abatement of its co-defendant were sustained (Record, page 33), and these pleas being overruled (Record, page 77), this defendant presented no other pleas, but submitted itself to the jurisdiction of the court and tried the case upon its merits. That by each one and all of these acts the Texas & Pacific Railway Company consented to the jurisdiction of the District Court for the Western District of Texas is too clear for argument. The opinion of Mr. Justice Brewer in the case of *In-re Moore*, 209 U. S., 496, is directly in point. He says:

"That the defendant consented to accept the jurisdiction of the United States Court is obvious. It filed a petition for removal from the State to the United States Court. No clearer expression of its acceptance of the jurisdiction of the latter court could be had. After the removal the plaintiff, instead of challenging the jurisdiction of the United States Court by a motion to remand, filed an amended petition in that court, signed a stipulation giving time to the defendant to answer, and then both parties entered into successive stipulations for a continuance of the trial in that court. Thereby the plaintiff consented to accept the jurisdiction of the United States Court, and was willing that his controversy with the defendant should be settled by the trial in that court. The mere filing of an amended petition was an appeal to that court for a trial upon the facts averted by him as they might be controverted by the defendant. And this, as we have seen was followed by repeated recognitions of the jurisdiction of that court."

"As we have seen in this case, the defendant applied for a removal of the case to the Federal Court. Thereby he is foreclosed from objecting to its jurisdiction. In like manner, after the removal had been ordered, the plaintiff elected to remain in that court, and he is, equally with the defendant, precluded from making objection to its jurisdiction."

PLAINTIFF IN ERROR'S SIXTH POINT OF LAW, UNDER  
ITS SIXTH ASSIGNMENT OF ERROR.

This proposition complains that the trial court erred in the second paragraph of its charge to the jury, in that the charge permitted a duplication of damages. Plaintiff in error's brief does not point out to this Court wherein the charge permits a duplication of damages, but it asserts that the charge is not only an incorrect instruction, but a duplication of damages, and the authorities cited by it are largely cases where the charge authorized a double recovery. We think it would have been fairer to this court and would have saved it time for plaintiff in error to have pointed out in what particular the charge authorized a duplication of damages, but it has not done so, and we must search the charge to see whether or not this general criticism is just. Plaintiff in error has arranged the elements of recovery which the charge permits the jury to take into consideration, and we suggest to this court that this analysis shows that duplication of damages is not authorized. We copy plaintiff in error's analysis of what the charge permits the jury to take into consideration: "1st: To take in consideration, reasonable expenses incurred for drugs, hospital services and medical and surgical treatment for any injuries she may have received: 2nd: Damages for mental and physical suffering, if any, which the plaintiff has undergone. 3rd: For any mental and physical suffering which any injuries will produce upon plaintiff in the future; 4th: For such further permanent injuries that will diminish the plaintiff's capacity to labor and earn money in the future." (Brief, page 91.)

The language of this analysis is that of the plaintiff in error, and we submit that it utterly fails to show that double damages are authorized.

The court's charge on the measure of damages is shown on page 45 of the record, and we submit that it presents a clear and admirable statement of the elements of damage which the jury was permitted to take into consideration in assessing the damages

sustained by the plaintiff. There is no error in this charge, and certainly none is pointed out in the brief of the plaintiff in error.

PLAINTIFF IN ERROR'S SEVENTH POINT OF LAW, UNDER ITS SEVENTH ASSIGNMENT OF ERROR.

We understand plaintiff in error's proposition to be that the court erred in the third paragraph of its charge to the jury, in that it instructed the jury that plaintiff would not be responsible for errors or mistakes of the surgeon who performed the operation, provided she used ordinary care in the selection of a reasonably competent surgeon, and did select a reasonably competent surgeon, and submitted her case to his judgment. Paragraph 3 of the court's charge is as follows:

"In this case the defendant's charge that the operation and removal of the plaintiff's ovaries was unnecessary, and that the surgeon who performed said operation was guilty of malpractice. In this connection I charge you that the plaintiff would not be responsible for the errors or mistakes of the surgeon who performed the operation, provided she used ordinary care in the selection of a reasonably competent surgeon, and did select a reasonably competent surgeon, and submitted her case to his judgment. If you find from the evidence that the plaintiff received hurts in said collision which lead to the injury and impairment of her ovaries, and if you further find that she used ordinary care in the selection of a reasonably competent surgeon, that is, such care as a person of ordinary prudence would have exercised under similar circumstances, and did employ a reasonably competent surgeon to perform said operation, and that he, acting upon his judgment, removed her ovaries, then I charge you that the defendant would be liable for the condition produced by reason of said ovaries being removed, notwithstanding some other course pursued by the surgeon might have saved the removal of her ovaries." (Record, page 45.)

We insist that this charge is absolutely correct, and is as



favorable to the defendant as it was entitled to have it. It in substance states the rule of law that it was plaintiff's duty to exercise ordinary care in the selection of a reasonably competent surgeon, and to submit her case to his judgment, and if she selected a reasonably competent surgeon, then she would not be responsible for the errors or mistakes of such surgeon. The charge required the jury to find that the plaintiff in fact received hurts in the railway collision which lead to the injury and impairment of her ovaries, and that she used ordinary care in the selection of a reasonably competent surgeon, and in fact did employ a reasonably competent surgeon, and that such surgeon, acting upon his judgment, removed her ovaries, and these facts being so found the defendant would be liable for the condition produced by the ovaries being removed, notwithstanding some other course pursued by the surgeon might have saved her ovaries. The principle announced in this charge is supported by the great weight of authorities, and in fact the cases cited by the plaintiff in error announce the doctrine in exact conformity with the court's charge.

In the first and leading case cited by plaintiff in error, *Texas & Pacific Ry. Co. vs. McKenzie*, 70 S. W. Rep., 237, the Court of Civil Appeals of Texas made a very clear statement of the principle. In that case a special charge was asked which sought to excuse the defendant if plaintiff's injuries were aggravated by the unskillful treatment of the physician, and the court holding the charge was properly refused, said:

"A party who receives an injury resulting from the negligence of another, and who neglects to use proper means to effect a recovery, cannot recover for the aggravation of his injuries accruing from such neglect." *Railway Co. vs. McMannewitz*, 70 Tex., 73; 8 S. W. Rep., 66. Whether there was neglect is a question for the jury to determine. To prevent aggravation of the injury, the party injured is only required to use such care and caution as an ordinarily prudent person would use under similar circumstances. The aggravation of a wound by unskillful treatment would not of itself prevent the recovery of damages by

reason of such aggravation, unless the injured person failed to use ordinary care to prevent such aggravation. When a personal injury flows from the negligent act of another, that other is responsible for the damages resulting, and all that the law demands of the injured party is to use ordinary care to avert further injury. *Selleck vs. City of Janesville* (Wis.), 80 N. W. Rep., 944; 47 L. R. A., 691; 76 Am. St. Rep., 892; *Railway Co. vs. O'Brien*, 18 Tex. Civ. App., 690; 46 S. W. Rep., 389. The charge requested was erroneous in instructing that the jury find for the defendant if 'the injury was aggravated by failure of prompt attention or unskilled treatment.' If the defendant negligently caused the injury, then it was responsible for the damages that proximately resulted therefrom. Whether defendant was responsible for the aggravation, if any, caused by failure of prompt attention or unskilled treatment, depended upon the care used by plaintiff to have the injury properly treated. *Railway Co. vs. O'Brien*, 18 Tex. Civ. App., 690; 46 S. W. Rep., 389."

The next case cited by plaintiff in error, *G., C. & S. F. Ry. vs. McMannewitz*, 70 Tex., 73, is as we have seen, cited with approval in the *McKenzie* case.

In the case of the *M., K. & T. Ry. Co. vs. Hagan*, 93 S. W. Rep., 1014, it was contended by the railway company that it was the plaintiff's duty to submit to an operation as a probable cure for the injuries, and the court laid down the doctrine that it was plaintiff's duty to exercise ordinary care to select competent surgeons, and to exercise ordinary care in having an operation performed if advised by his surgeons. The dominant note of the decision is that it was the duty of the injured party to exercise ordinary care to select a competent surgeon, and then be guided by the advice of such surgeon. In the present case we submit that if Miss Hill had declined to accept the advice of her surgeon and to submit to an operation, plaintiff in error could have contended with some force, as in the *Hagan* case, that having selected a surgeon, it was her duty to be guided by his advice and to have submitted to an operation.



In the next case cited, *St. L. & S. Ry. vs. Johnson*, 94 S. W. Rep., 162, the railway contended that it was the duty of the injured person to exercise ordinary care to employ physicians, and if this had been done the injury would have been lessened. The court announced the principle that it was plaintiff's duty to exercise ordinary care to employ reasonably competent physicians, and we think it necessarily follows that if it is the duty of an injured person to employ reasonably competent physicians, then it is likewise his duty to be guided by the advice of such physicians.

The case of *Texas & Pacific Ry. Co. vs. White*, 101 Fed. Rep., 928, decided by this Honorable Court, recognizes the principle that it was the duty of the plaintiff to procure the advice of a competent physician and surgeon, and that whether or not the plaintiff exercised ordinary care in this respect was a question of fact for the jury.

Our examination of the authorities leads us to state to this court that we have found no case which holds that when an injured person uses ordinary care in the selection of a competent surgeon that he becomes responsible for the errors or mistakes of such surgeon.

The Text book writers, without an exception, so state the rule, and cite many authorities:

Watson, in his work on personal injuries, Section 136, says:

"It is not difficult to discern the justice of the rule which holds that where one person, injured by the wrong or negligence of another, employs due care in the selection of a physician or surgeon, the defendant will be held liable for all consequences of his own act, though had the plaintiff's medical attendant exercised proper professional competence and skill, the consequences of the injuries would have been less serious than they proved."

Moore, in his *Work on Carriers*, on page 882, says:

"But where he has used ordinary care in the selection of a physician of ordinary skill, any injury or pain resulting from the

manner in which the injury was treated or the operation performed is properly regarded as within and a part of the result of which the injury, occasioned by the negligence of the carrier, was the proximate cause, and the carrier liable therefor."

Cyclopedia of Law and Procedure, Vol. 13, Page 77, is as follows:

"UNSKILFUL TREATMENT BY PHYSICIAN. Where a party has used reasonable care in selecting a physician or surgeon, but owing to unskilful treatment, the injury has been increased, the party causing the original injury will be held liable in damages for the latter."

Thompson, Commentaries on the Law of Negligence, Vol. 1, Paragraph 66, says:

"INTERVENING NEGLIGENCE OF PHYSICIANS, SURGEONS OR NURSES IN TREATING PERSONS INJURED: If A. has received a physical injury for which B. is liable, and A., acting in good faith, exercises reasonable care, under the circumstances, in the *selection of a physician or surgeon* to treat the wound, but, notwithstanding this, the hurt is aggravated by the unskilful treatment of the physician or surgeon thus employed, A. may recover of B. the enhanced damages produced by the unskilful treatment; they are deemed to follow proximately from B's wrong. The rule is the same where the injury results in death; so that if the deceased acted in good faith and with proper diligence in employing a physician or surgeon, but dies under his treatment, those entitled to maintain an action for damages for his death are not precluded from maintaining such action by the fact that the death would not have resulted from the accident if the deceased had been properly treated. The reason is that the injured person, having exercised ordinary care, caution and judgment in selecting a physician, nurse or surgeon, is not made by the law an insurer of the professional skill and knowledge of the person thus selected, and also of his immunity from mistakes, accidents and errors of judgment. Another obvious reason is that, in the present imperfect state of the medical

and surgical art, mistakes of judgment on the part of physicians and surgeons are to be anticipated by wrong-doers, as likely to follow the infliction of physical injuries upon others. On this subject it has been well said (citing from *Stover vs. Bluehill*, 51 Me., 442); 'In the present imperfect state of medical science and amidst the conflicting theories of medical men, as well as the uncertain reliance to be placed upon the different modes of treating injuries and diseases, it would not be difficult to make it doubtful, in a given case, if the professional treatment might not have been improved, or was unskilful, and thus a way of escape might be prepared for wrong-doers from the legitimate and legal consequences of their negligence or misconduct. The principle, therefore, of holding the defendants responsible, is founded in sound reasons of public policy.' Therefore, where a person who, through the negligence of another, has received an injury which, without a surgical operation, would cause his death, employs a skilled and competent surgeon, by whose mistake the operation is not successful, and the patient dies, the wrong-doer is not released from liability by reason of the surgeon's error; and this although the operation is the immediate cause of the death."

In the case of *Sellick vs. City of Janesville* (Wis.), 80 N. W. Rep., 944, the precise point was involved, because in that case error was assigned upon the charge of the court for the identical reason assigned in the present case, and in answering the contention the court said:

"Error is assigned because the court charged the jury that: 'The plaintiff is not held responsible for the errors or mistakes of a physician or surgeon in treating an injury received by a defect in the street or sidewalk, providing she exercises ordinary care in the procuring the services of such physician. Where one is injured by the negligence of another, or by negligence of a town or city, if her damages have not been increased by her own subsequent want of ordinary care she will be entitled to recover in consequence of the wrong done, and the full extent

of damage, although the physician that she employed omitted to employ the remedies most approved in similar cases, and by reason thereof the damage to the injured party was not diminished as much as it otherwise should have been.' Such charge is certainly supported by authority as well as reason. *Loesser vs. Humphrey*, 41 Ohio St., 378; *Railway Co. vs. Falvey*, 104 Ind., 411, 424; 3 N. E., 389, and 4 N. E., 908; *Reed vs. City of Detroit*, 65 N. W., 967; 108 Mich., 224; *Car Co. vs. Bluhm*, 109 Ill., 20; *Rice vs. City of Des Moines*, 40 Iowa, 638; *Stover vs. Inhabitants of Blue Hill*, 51 Me., 439; *Tuttle vs. Farmington*, 58 N. H., 13; *Boynton vs. Somerworth, Id.*, 321; *Lyons vs. Railway Co.*, 57 N. Y., 489; *Bardwell vs. Town of Jamaica*, 15 Vt., 438. The wrong-doer may well anticipate that the person injured will employ a physician or surgeon, and in doing so will exercise ordinary care in making the selection; but, where that is done, such person cannot be expected to assume the responsibility of the very highest degree of skill. *Sellock vs. City of Janesville (Wis.)*, 80 N. W. Rep., 944."

The case of *Fields vs. Mankato Elec. Traction Co.*, 133 N. W. Rep. 577 (Minn.), is also exactly in point. In that case the defendant offered evidence to prove that the medical treatment was unskillful and had aggravated plaintiff's injuries, and the Supreme Court of Minnesota held that it was not competent to prove such unskillful treatment. The reasoning of the court is very clear and to the point. It says:

"It is conceded that the plaintiff received a severe injury in so falling from the car. Such injury required expert medical treatment. The necessity for the attendance and services of physicians was created by the defendant. The plaintiff without negligence on her part, obtained the attendance and services of physicians so made necessary. The risks incident to submitting to treatment and operations were thus incurred through the fault of the defendant, not through the fault of the plaintiff. Whether the physicians skillfully or unskillfully performed the necessary services, the plaintiff not being in fault in any matter,

her impaired physical condition at the time of the trial followed in unbroken causal sequence, the negligence of the defendant in handling the car. The trial court did not err in excluding the testimony offered."

We could further multiply authorities, but it would seem to be unnecessary, as there is no dissent in the authorities on this question. The following cases are directly in point:

H. & T. C. Ry. vs. Hanks, 124 S. W. (Tex.), 136.

St. L. & S. F. Ry. vs. Doyle, 25 S. W. (Tex.) 461.

Reed vs. City of Detroit, 65 N. W. Rep., 967.

Louisville N. A. Ry. vs. Falvey, 3 N. E. Rep., 389.

Lyons vs. Railway Co., 57 N. Y., 498.

Collins vs. City of Council Bluffs, 32 Iowa, 329.

PLAINTIFF IN ERROR'S EIGHTH POINT OF LAW, UNDER ITS TENTH ASSIGNMENT OF ERROR.

By this proposition plaintiff in error asserts that the court erred in its general charge in charging the jury that the plaintiff would not be responsible for her want of care in having the operation performed, just so she had it performed by a doctor she used care in selecting. Plaintiff in error does not point out or identify the part or paragraph of the court's charge which it claims to be erroneous, and we are not sure that we clearly comprehend the meaning of its proposition, for if it intended to assert that the trial judge instructed the jury that plaintiff would not be responsible for her own want of care, the criticism is not borne out by the record, for the court distinctly placed upon the plaintiff the duty to exercise such care as a person of ordinary prudence would have exercised under like circumstances. This proposition is submitted under plaintiff in error's tenth assignment of error, and when we turn to this assignment we find that it asserts that the court erred in its general charge in charging the jury that the plaintiff would not be responsible for the errors

and mistakes of the surgeon who performed the operation, provided she used ordinary care in the selection of a reasonably competent surgeon. This complaint we have answered under the previous assignment of error, and we do not deem it necessary to add anything on this subject. The charge of the court is very clear, and correctly states the rule of law.

Under this assignment the plaintiff in error seems to contend that the court should have submitted to the jury whether or not the plaintiff used ordinary care in making preparations for the restoration of her health before selecting any surgeon to perform an operation. While we do not think that this contention is at all germane to the assignment, yet plaintiff in error has said so much throughout its brief about plaintiff's recklessness or carelessness in submitting to an operation without seeking to be cured by treatment that we deem it not inappropriate to call the court's attention briefly to the care used by plaintiff in having proper medical treatment.

Plaintiff was injured on December 22, 1911, and upon reaching the home of her parents at Queen City she promptly went under the treatment of Dr. Strong, a regular practitioner at Queen City. Plaintiff remained under Dr. Strong's treatment until January 15th, 1912, when, her condition not showing any improvement, he removed her to Dr. Dale's sanitarium at Texarkana; she remained in this sanitarium, under Dr. Dale's treatment, until about February 1st, and then returned to her parents' home at Queen City. She remained there under the treatment of Dr. Strong until March 24th, when she returned to her own home at Pearsall. She made this trip upon the advice and with the permission of her attending physician, Dr. Strong. Arriving at Pearsall she immediately went under the treatment of Dr. Williamson, a regular practitioner at that place, and was under his treatment, when about May 27th he advised her to come to San Antonio for consultation with other physicians. Dr. Williamson brought the plaintiff to San Antonio for consultation with Dr. Kingsley and Dr. Berrey, two distinguished physicians of that



city. They made two examinations of the plaintiff, and advised the operation. Plaintiff did not have the operation performed at that time, but returned to her home with Dr. Williamson. Her condition growing worse, she returned to San Antonio on June 15th, went into the hospital on June 16th, and was operated on June 17th by Dr. Kingsley, assisted by Dr. Williamson and Dr. Kemp. She remained in the hospital something over two weeks and then returned to her home, and was under the care and treatment of Dr. Williamson continuously to the time of the trial.

This evidence is entirely undisputed, and there is no suggestion in the record that plaintiff did not use ordinary care in seeking the restoration of her health. The contention of plaintiff in error throughout the trial was that the doctors should not have removed plaintiff's ovaries and that plaintiff should be held responsible for any mistake or error of judgment of her physicians.

Under the head of "Remarks," in its brief, page 98, plaintiff in error contends that the trial court should have submitted to the jury as issues of fact, whether or not Miss Hill would have gotten well if she had continued under the treatment of her first two doctors, Doctors Strong and Dale, and also whether she was guilty of negligence in not continuing under their treatment. We do not think these remarks are pertinent to the assignment, because the assignment complains of affirmative error in the court's charge, and does not complain of the court's failure to submit issues of fact, as suggested by its remarks. If the trial court failed to submit to the jury defensive issues which were raised by the pleadings and the evidence, the plaintiff in error should have requested special charges supplying such omissions, and the refusal to give such charges should be assigned as error. The plaintiff in error did not request the trial court to submit to the jury whether Miss Hill would have gotten well had she continued under the treatment of her first two doctors, and whether she was negligent in not continuing under their treat-

ment, and plaintiff in error has no assignment of error based upon the failure of the court to so charge.

We may further add that as far as we can understand its pleading, plaintiff in error has no pleading alleging that Miss Hill would have recovered had she continued under the treatment of her first two doctors, or that she was negligent in not doing so. Our construction of plaintiff in error's answer, on which the case was tried, is that it pleaded:

(a) That Miss Hill had entirely recovered from the effects of the railway collision; (b) That the operation performed on Miss Hill for the removal of her ovaries was unnecessary; (c) Or if it was necessary, then it was on account of some illness or condition existing prior to the collision.

That the court may see what defensive issues were pleaded by the plaintiff in error, we will insert here that part of its answer taken from the record:

"Defendant further represents that the treatment that plaintiff had, and constant insistence and persuasion of others, had the psychological effect upon the plaintiff so that she was induced, and did see different and various doctors and that she was thereby impressed by the said doctors and her kin, that she had cause of action against the Texas & Pacific Railway Company that would produce a large amount of money in a suit for damages, so that this defendant says that whatever complaint, and of whatever character or nature it was, was had by plaintiff before the said alleged accident, and on account of her condition and persuasions as they brought to bear upon her, she was induced to submit to the operation that was had upon her and such operation was wholly unnecessary, or if necessary it was on account of plaintiff's condition prior to the time when the operation was made upon her. That the accident of which she complains as the cause of her injury was not the cause thereof, and if she is now permanently injured in any way by reason of such operation by the doctors of her own selection, such operation was both on her account and that of her physicians'



negligence and the proximate cause of her injury, which resulted from conditions that existed theretofore, which affected plaintiff's health prior to the date of the alleged injury, claimed to have been received on the railroad. And insofar as any injury done to her by reason of such alleged accident, she being sick at the time, had entirely recovered therefrom, and such injuries, if any, had been entirely relieved and her condition alleged by her was brought about by reason of her own prior condition and her acts and conduct thereafter, and any injury resulting from the operation and condition would not have occurred except for the result following her negligence in having said operation, which no person of ordinary care and prudence would have undergone, and notwithstanding the alleged act of negligence by the railway company, the present injury is not the direct and immediate result of said act following a natural and unbroken sequence, and therefore the railway company is not guilty of any negligence resulting from the alleged injuries which were the proximate result of said alleged accident of defendant's train of cars, but was on account of her own carelessness and want of care in allowing said operation to take place, which was the proximate cause of her injury.

The defendant further answering alleges that the plaintiff was in poor health at the time of the accident complained of and had been for a long time and that she had recovered from any and all injuries, if any, she received in or caused by the railway accident, and that the operation when performed was caused by and was the natural sequence of the disease she was suffering from before the accident, for the consequence of which the defendant is in no way liable, and prays for judgment and cost." (Record, pp. 36-38.)

PLAINTIFF IN ERROR'S NINTH POINT OF LAW, UNDER  
ITS THIRTEENTH ASSIGNMENT OF ERROR.

By this proposition plaintiff in error contends that the trial court erred in not giving special charge No. 5, requested by it. This requested charge is as follows:

"If you believe from the evidence that the plaintiff had the operation performed, as alleged, on account of hurts received in the accident, you cannot consider any injury that came to her from the same unless it came as a result from the shock received in said train or from concussion, there being no allegation in plaintiff's pleading that the injury was received in any other way; and in considering the injuries received from them or from the collision, you will disregard every element of injury that would flow entirely from traumatism, that is, a blow of some kind." (Record, page 50.)

We cannot conceive of any theory of the case that would have justified an instruction to the jury to "disregard every element of injury that would flow entirely from traumatism, that is, a blow of some kind." The requested charge seems to proceed on the theory that because plaintiff's petition alleged that she received a severe shock and concussion, that therefore she could not recover for any injuries which were produced by traumatism or direct violence. This would certainly be a most strained construction of plaintiff's petition, because the petition as an entirety clearly alleged that the train on which plaintiff was a passenger came in violent collision with another train, and that by reason of the collision of the two trains plaintiff was severely and permanently injured. It is only physical injuries that the petition deals with, and these alleged to be due to the violent collision of the two trains. The court will note that the petition contains the direct allegation that by reason of the negligence of the Texas & Pacific Railway Company, its agents and employes, there was a collision of two trains and the plaintiff was severely and permanently injured (Record, page 4); and this is followed by the further allegation, "Plaintiff avers that, by reason of said collision, the said Clara Hill was seriously and permanently injured in the following respects"; and then the petition enumerates the various injuries which she sustained, all of which are physical injuries. (Record, page 5.) The fact that plaintiff alleged that she received a

severe shock and concussion, and that by reason thereof her nervous system was severely shocked and injured and impaired, and that her spine and spinal column were injured and impaired certainly does not indicate that plaintiff was relying upon a mental injury, as distinguished from a physical injury.

The petition further alleges that, by reason of said shock and concussion her hip and back were severely and permanently injured, and her ovaries were so severely injured that it caused them to be so inflamed and ulcerated that it became necessary that both be removed, and that her appendix became ulcerated and affected to such an extent that it became necessary to remove it.

It is thus made clear that the petition alleges physical injuries resulting from the shock, force and violence of the collision of the two trains. This certainly means traumatic injuries, for traumatism means shock, force, violence. Even if the words "shock and concussion" were inaptly or inappropriately used in the petition, the entire petition would be looked to in determining the character of injuries sustained. The petition contains no suggestion of fright or such mental injuries as are unaccompanied by physical injuries, and all of the injuries described are purely and necessarily physical injuries. When the petition alleged that, by reason of the shock and concussion her back and spine and hip were severely injured, and that her ovaries were so severely injured that it caused them to be inflamed and ulcerated, necessitating their removal, it plainly meant that plaintiff had sustained physical injuries due to the force and violence of the two colliding trains. This meaning is in perfect accord with the proper and ordinary meaning of the words "shock and concussion." Webster defines concussion: "A shock caused by a collision of bodies," and he defines shock: "A blow, impact, collision, concussion or violent shake or jar; an abrupt forcible onset; the effect of such violence." To say that the petition excludes injuries due to traumatism or violence, is to contradict the plain meaning of the petition as a whole.

Plaintiff in error relies upon the case of Haile's Curator vs.

T. & P. Ry., 60 Fed. Rep., 557, which is not at all in point. The report of that case shows that plaintiff sought to recover damages for insanity, caused by mental shock or agitation, unaccompanied by any physical injuries. Exceptions to the petition were sustained on the ground that the insanity was not the proximate result of the railway accident, and on appeal this result was affirmed. The petition in that case bears no analogy whatever to the petition in the present case, because no physical injuries were alleged and it was claimed that the insanity was due to fright and mental agitation. The court's opinion clearly shows that physical injuries were not relied upon, and the decision is based upon this view. We quote from the opinion as follows:

"A shock is a sudden agitation of body or mind. It may affect the body or mind. The petition avers that Haile lay helpless and prostrated, but whether from a bodily or mental shock is left somewhat uncertain by the averments of the petition. The shock averred may reasonably be construed to mean the one or the other. But there is no charge that any bodily injury was sustained by the shock, and no claim for damages for any such injury \* \* \* He sustained no bodily injury by the accident, so far as the petition shows; but it caused a shock and an excitement, which, under his peculiar mental and physical condition at the time, resulted in his insanity."

The case of G., C. & S. F. Ry. vs. Hayter, 93 Tex., 239, decided by the Supreme Court of Texas, is a well considered case, and does not sustain the contention of plaintiff in error. In that case the plaintiff had a serious nervous affection, known as traumatic neurasthenia, resulting from physical or mental shock produced by a railway accident, and the appellant contended that plaintiff could not recover for injuries, the mere result of shock or fright, when the defendant had not inflicted any bodily injury. The opinion delivered by Chief Justice Gaines reviews many authorities on the subject, and concludes as follows:

"We conclude that where a physical injury results from a fright or other mental shock, caused by the wrongful act or

omission of another, the injured party is entitled to recover his damages, provided the act or omission is the proximate cause of the injury, and the injury ought, in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof."

PLAINTIFF IN ERROR'S PROPOSITION OF LAW, UNDER  
ITS FOURTEENTH ASSIGNMENT OF ERROR.

By this proposition plaintiff in error complains that the trial court erred in not giving special charge No. 6.

The requested charge No. 6, is as follows:

"If you believe that the plaintiff's condition, as alleged by her, was brought about by reason of her prior condition and her acts and conduct thereafter, and any injuries resulting from the operation, and the others would not have occurred except for the result of her own negligence in having said operation performed, as no person of ordinary care and prudence would have undergone, and notwithstanding the alleged act of negligence upon the part of the railroad, the present injuries are the direct and immediate result of said act, following in natural and unbroken sequence, and the railroad company was not guilty of any negligence resulting from her alleged injuries which were the proximate result of her said accident in the defendant's trains of cars, but was on account of her own carelessness and want of care in allowing said operation to take place, which was the proximate cause of her injuries, you will find for the defendant." (Record, p. 52.)

It may be that the trial court refused this charge because he could not be entirely certain of its exact meaning, or he may have doubted whether the jury, unlearned in the intricacies of the law, could follow the tortuous windings of this learned dissertation on the law of proximate cause. Be that as it may, the court took the safer course and gave other special charges requested by plaintiff in error which were less complex, and in direct language told the jury that plaintiff could not recover for

any injuries unless such injuries were directly and proximately caused by the railway collision.

There are so many objectionable features in the requested charge that we will not endeavor to suggest all of them. By the following part, it would have permitted the jury to find that all of plaintiff's injuries were due to the operation; "and any injuries resulting from the operation *and the others* would not have occurred except for the result of her own negligence in having said operation performed, as no person of ordinary care and prudence would have undergone." By its own terms it includes all injuries due to the operation, and for good measure adds "and the others," and permits the jury to find that both groups of injuries were due to the operation. Of course, it is clear that the operation affected only the organs removed, and could not have caused the injury to plaintiff's hip and the curvature of her spine, which existed before the operation was had. The charge directly assumes that plaintiff failed to exercise ordinary care in having the operation performed, and charges the jury that no person of ordinary care would have undergone this operation. The charge would have permitted the jury to find "*and the railroad company was not guilty of any negligence resulting from her alleged injuries which were the proximate result of her said accident in the defendant's train of cars.*" This seems to present a confused scrambling of legal terms and probably would not have materially aided the jury in finding the facts. The charge directs a verdict for defendant if plaintiff was negligent in allowing the operation to be performed, regardless of the other injuries sustained by plaintiff having no relation to the operation. It makes plaintiff's negligence in submitting to the operation six months after the collision a complete defense to the case.

We further suggest that the court's charge and the special charges given at the request of plaintiff in error amply protect the rights of the plaintiff in error. The court's main charge, in paragraph 2, required the jury to find "that the plaintiff directly received any of the injuries alleged in her petition by



reason of said collision" (Record, p. 45), and by paragraph 4 of the charge, the jury was instructed, "Whether the plaintiff was really hurt in the collision before mentioned, or whether she is malingering, is a question which is submitted to you to be determined from a consideration of all the facts and circumstances in evidence. Should you find that the plaintiff was not injured in said collision, then your verdict should be in favor of the Texas & Pacific Railway Company." (Record, p. 46.)

At the request of plaintiff in error the following two special charges were given to the jury:

"If you believe that the injuries received by plaintiff were not the direct and proximate result of the railroad accident, then you will find for the defendant." (Record, p. 56.)

"I further charge you that you will not consider any damages or any condition of the plaintiff that arose after the accident, unless you find from a preponderance of the evidence that she received such injuries in the wreck or collision of the Texas & Pacific Railway trains of the 22nd day of December, 1911, or that the said injuries followed in unbroken sequence from the injuries there received and were directly and proximately caused and produced by the hurt she received in said collision, if any." (Record, p. 57.)

PLAINTIFF IN ERROR'S TENTH POINT OF LAW, UNDER  
ITS FIFTEENTH ASSIGNMENT OF ERROR.

This point of law contends that the trial court erred in refusing to give its requested charge No. 9. This charge is as follows:

"You are instructed that, if you believe from the evidence that at the time the plaintiff was operated upon that she was a neurasthenic, and was suffering from neurasthenia, and that she was influenced to submit herself to the surgical operation when it was not necessary and when other treatment would have entirely cured and relieved her, and that she did not use and exercise

ordinary care, and such want of care, if you believe she did not exercise proper care, caused her to select a doctor when it was not necessary, and that her act contributed to the injury, then the railroad company would not be responsible in damages for the consequence of the operation that was performed upon her; and you will, in summing up the amount of damages you will find she was entitled to, if any, not consider the operation upon her, and the removal of any of her organs in finding a judgment and assessing damages against the defendant, but will only assess such damages as arose from the injury otherwise than as hereinbefore instructed." (Record, pp. 51 and 52.)

This charge was correctly refused because the court's charge upon the subject of plaintiff's operation, paragraph No. 3 of the court's charge, correctly states the law upon the subject, and there was no need for giving an additional charge on this subject. This paragraph of the court's charge is discussed in this brief under the plaintiff's Seventh Point of Law, and we submit that the court's charge is absolutely correct.

Insofar as the proposed charge seems to instruct the jury that the defendant would not be responsible for the result of the operation if plaintiff herself was guilty of negligence in having the operation performed, this is fully covered by the court's main charge. We do not believe that there is any evidence in the record requiring the submission of the issue of plaintiff's negligence in submitting to the operation. The undisputed evidence shows that plaintiff was under the treatment of Dr. Williamson, a reputable physician in her home town, and that he advised her to come to San Antonio for consultation with Dr. Kingsley and other physicians. The plaintiff did so, and at this consultation between Dr. Williamson, Dr. Kingsley, and Dr. Berrey, the operation was advised. Plaintiff was not operated on at that time, but returned home, and her conditions growing worse, about a month later Dr. Williamson brought her to San Antonio and she consented to the operation. There is no issue as to Doctors Williamson, Kingsley and Berrey being reputable and, in fact,



distinguished physicians. Even the evidence of plaintiff in error bears witness to Dr. Kingsley's high character and standing as a surgeon. Dr. Herff testified that under the circumstances, as they appeared to Dr. Kingsley, he would not hesitate a moment in removing the ovaries. (Record, pp. 249 and 250. He further said: "I regard Dr. Kingsley as a specialist in the line of operations such as was performed on plaintiff. And I feel exactly like I would rather trust Dr. Kingsley's judgment in the matter, where he had his eyes right on the patient, than to criticise him about something I did not see. The patient would have no voice in the matter of the operation if the doctor told her beforehand, 'you will have to leave this to me'; and in fact the surgeon ought to do just what he thinks best. Oftimes the surgeon has to do things after entering the cavity that he never dreamed of, and he would be justified in doing what he thought proper." (Record, p. 250.)

Defendant's witness, Dr. Strong, testified as follows:

"If Dr. Kingsley says that a certain condition existed with plaintiff's ovaries, he ought to know more about it than anybody else. When the plaintiff got on the operating table she could not tell what was going to be done to her, but would have had to trust her surgeon. It is true that when a patient gets on the table they risk their life to the surgeon because they have to." (Record, p. 220.)

This testimony came from witnesses for plaintiff in error, and it shows that the plaintiff, having placed herself under the care and treatment of competent physicians, committed no greater carelessness than to be guided by their advice. Whether or not the physicians may have made a mistake in removing her ovaries is entirely a different matter, but we submit there is no evidence whatever tending to show that the plaintiff was guilty of negligence, either in employing the physicians, or being guided by their advice.

We also call the court's attention to the fact that the testimony of all of the physicians who were present at the operation

on plaintiff shows that when the abdominal wall was opened, numerous inflammatory adhesions were found, and these adhesions were separated; that the appendix was club shaped, and larger than normal, and also bound down by adhesions; that both ovaries were enlarged, inflamed, prolapsed and so diseased that they had to be removed, and the left tube was swollen, enlarged and bound down by adhesions, and these conditions required an operation. (See testimony of Dr. Kemp, Record, p. 163.)

On the subject of the operation the testimony of the plaintiff in error took issue with that of the defendant in error only on the propriety of removing the ovaries. Its evidence does not tend to show that the operation was wholly unnecessary, but was confined to the proposition that the ovaries should not have been removed. This position of the plaintiff in error is well shown by the resume of his testimony made by Dr. Dale, a witness for plaintiff in error. He testified as follows:

"I have taken both ovaries from a woman. I differ with Dr. Kingsley as to the cause of removal of plaintiff's ovaries. He said they were so diseased they had to come out, but he described the conditions there, and I would not have removed them for that cause. Of course, the plaintiff was not consulted about that, and she is not to blame. When the cavity was opened and the surgeon thought her ovaries ought to be out, the plaintiff could not be blamed for that." (Record, p. 232.)

The charge in question would have been very misleading to the jury in permitting them to find that at the time the plaintiff was operated upon she was suffering from neurasthenia, and that she was influenced to submit herself to the surgical operation, in this; that plaintiff was operated upon June 17th, 1912, nearly six months after she received the injury, and the evidence tends to show that the plaintiff's nervous or neurasthenic condition at the time of the operation was due to the injury, and plaintiff in error would seek to base its defense in part at least upon this condition, which was brought about by the railway collision. Further than this there is no evidence whatever that plain-

tiff was influenced by anyone to submit to the surgical operation. She merely took the advice of her physicians, and it would have been improper in charging the jury to suggest that while in a neurasthenic condition she was influenced to submit herself to the operation. The proposed charge is incomplete in that it did not tell the jury that the plaintiff would not be responsible for the errors or mistakes of the surgeons if they believed the operation was necessary, provided plaintiff exercised ordinary care in selecting them. The main charge of the court presented this issue fully and completely, and there was no need whatever for giving the requested instruction.

PLAINTIFF IN ERROR'S ELEVENTH POINT OF LAW, UNDER ITS SEVENTEENTH ASSIGNMENT OF ERROR.

By this proposition plaintiff in error contends that the trial court erred in not granting its motion for a new trial on the ground that the verdict was excessive. The law is so well settled that the appellate courts will not review the discretion of the trial court in refusing to grant a motion for new trial on the ground that the verdict is excessive, that we will not consume the time of this court in discussing this proposition.

*Duke vs. S. L. & S. F. Ry.*, 172 Fed. Rep., 686.

*Southern Ry. vs. Bennett*, 233 U. S., 80-86.

The case cited by plaintiff in error on page 114 of its brief merely hold that it is within the power of the trial court to grant a new trial on the ground of the insufficiency of the evidence on any material issue, but none of the authorities hold that an appellate court will review the action of the trial court when it has refused to grant a motion for a new trial.

The distinguished trial judge who tried this case saw the plaintiff in her deplorable condition, and heard the witnesses testify, and if he had thought the verdict of the jury was excessive, he would not have hesitated to set the verdict aside or to require a remittitur to be entered. Having heard and overruled

the motion for a new trial, his action in so doing should not be reviewed by this court.

### CONCLUSION.

In conclusion, we wish to say that the brief of plaintiff in error demonstrates that there is no real or substantial Federal question involved in this case; that the action was simply a common law action for negligence of a carrier and an injury to a passenger, and the fact that the plaintiff in the court below was a passenger and that her train ran into an open or misplaced switch and had a head-end collision with another passenger train being wholly undisputed, the only issues of fact to be determined were whether the plaintiff was injured in the collision, and the amount of compensation to be awarded her.

The brief of plaintiff in error does not even suggest a question requiring the interpretation of the constitution or an Act of Congress, and the case made by the record merely involves questions of general law incident to the trial of common law actions for negligence, and while it appears from the petition for removal from the State Court to the Federal Court, and not elsewhere, that the plaintiff in error is incorporated by an Act of Congress, yet there are no questions presented requiring a consideration of this Act of Congress, or depending in any particular upon it.

We respectfully submit that all questions presented by this Record have been settled and procluded by the decisions of this Honorable Court, and are so frivolous as to warrant the conclusion that the Writ of Error was sued out for delay only, and the judgment should be affirmed with a penalty for delay under the Second Paragraph of Rule 23.

Southern Ry. Co. vs. Gadd, 233 U. S., 572.

Chicago Junction Ry. vs. King, 222 U. S., 222.

Waterworks Co. vs. Louisiana, 185 U. S., 345.

The Record in this case shows that the plaintiff in error has had a fair and impartial trial, and that the case was given full and fair consideration by the Circuit Court of Appeals, and the judgment ought to be affirmed.

We respectfully pray that the judgment be affirmed.

*Magnus Smith*

*W. Carter - Perry J. Lewis*

Attorneys for Defendant in Error, Clara Hill.

Office Supreme Court, U.

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CLERK

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IN THE

# Supreme Court of the United States

NO. 482.

TEXAS PACIFIC RAILWAY COMPANY,  
Plaintiff in Error.

—VS.—

CLARA HILL,  
Defendant in Error.

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BRIEF OF PLAINTIFFS IN ERROR

---

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Supreme Court of the United States

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TEXAS PACIFIC RAILWAY COMPANY,  
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Defendant in Error.

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BRIEF OF PLAINTIFFS IN ERROR

---

GEORGE THOMPSON,  
COBBS, ESKRIDGE & COBBS,  
Attorneys for Petitioner.

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A GENERAL STATEMENT OF THE NATURE AND RE-  
SULT OF THE CASE

It was impossible to shorten this brief and narrow it to a few issues for the reason the Honorable Circuit Court of Appeals

affirmed without any written opinion necessitating us to bring it before this Honorable Court for review on all issues raised below.

This suit was instituted by Petition filed in the District Court of Frio County, Texas, against the International & Great Northern Railway Company and the Texas & Pacific Railway Company, filed on the 24th day of August, 1912, (Record page 3), seeking to recover damages to the extent of Forty-one Thousand, Eight Hundred (\$41,800.00) Dollars from the Defendants. The cause of action as alleged, was that plaintiff on the 21st day of December, 1911, purchased from the Agent of the International & Great Northern Railway Company, a through ticket from Pearsall, Texas, to Atlanta, Texas. That the ticket was purchased from the agent of the I. & G. N. Ry. Co. in Pearsall and that the two railways were connecting carriers, whose connecting lines connected at Longview, Gregg County, Texas. That the plaintiff was safely transported on the ticket to a point in Cass County, near Atlanta, Texas, over the lines of the Texas & Pacific Ry. Co., where, on or about the 22nd day of December, 1911, by reason of the negligence of the Texas & Pacific Ry. Co., there was a collision of two trains and plaintiff was severely and permanently injured, and further alleged that the I. & G. N. Ry. Co. and the T. & P. Ry. Co. were partners and acting as agents of the other in making the contracts of transportation.

At the date of the injury, the I. & G. N. Ry. Co. owned and operated a line of railway in Frio County, Texas, with the local agent representing it at Pearsall, Texas. Plaintiff alleges that by reason of the collision she was seriously and permanently injured in the following respect: "She received a severe shock and concussion and by reason thereof her nervous system was severely shocked and injured and impaired. \* \* \* \* She is afflicted with nervous prostration which makes it utterly impossible for her to perform labor of any kind; that by reason of said shock and con-



cussion the said plaintiff's spine and spinal column in their entirety were injured and impaired to such an extent as to cause the said Clara Hill great pain and nervous agitation; that by reason of said shock and concussion her hip and back were severely and permanently injured; that by reason of said shock and concussion her ovaries were so severely injured that it caused them to be so inflamed and ulcerated that it became necessary for them to both be removed; also the shock to her appendix caused the same to become so ulcerated and infected to that extent that it became necessary also to remove it; that by reason of said injuries to her spinal column, hip, ovaries and appendix she suffered and has continued to suffer, great pain."

Plaintiff further alleged that the injuries were permanent and that she "has been reduced from a strong healthy young lady to that condition of an invalid; that while she is a young girl, by reason of said injuries she has been placed in a physical and nervous condition that will render the functions of womanhood void, which will remain with her the balance of her life," etc.

She asked for Twelve Hundred (\$1,200) Dollars for treatment of physicians, and for hospital services and drugs, together with nurses, etc., Six Hundred (\$600.00) Dollars. That she was earning Five Hundred (\$500.00) Dollars per annum with the reasonable expectancy of increasing in the future. She therefore plead damages for Forty Thousand (\$40,000.00) Dollars with the said Eighteen Hundred (\$1,800.00) Dollars, making the sum of Forty-one Thousand, Eight Hundred (\$41,800.00) Dollars in the aggregate, she plead judgment.

On the 14th day of September, 1912, notice was given by the T. & P. Ry. Co. of its purpose to remove said cause to the Federal Court. (Record p. 2) and the defendants filed Petition and Bond for removal into the United States District Court at San Antonio, which was accordingly done by an order of Court duly entered, which was filed in the United States District Court on the 14th day of October, 1912. (Record p. 18.)

— + —

The I. & G. N. Ry. Co. filed its answer in the same cause, pleading first, an improper joinder in this suit with the T. & P. Ry. Co. because the Petition showed that the suit was for injuries that were committed by the T. & P. Ry. Co. in Cass County, as alleged and did not grow out of any damages, loss or other cause growing out of the transportation or contract in relation to the carriage of passengers, freight, baggage or other property.

And second, because it showed upon its face that the injuries were based upon injuries resulting from the action of the Texas & Pacific Ry. train and the suit was filed in Frio County, based upon the Act approved March 13th, 1905, which act had no application to cases of this kind and for such purpose such act was void and inoperative for said purpose, or any other purpose, as fixing or attempting to fix the venue of suit for the injuries done to passengers by the foreign roads, and the same did not comply with the provisions of the law and constitution as contained in Article 3 thereof, and the sections of said article prescribing and setting forth the manner in which the original bills should be proposed and introduced, or amendments as required by law. Said act is in conflict, if construed to fix venue in Frio County, with Act. 1901, p. 31.

Third, it alleged that the International & Great Northern Ry. Co. was a corporation doing business in the State of Texas; that the Texas & Pacific Ry. Co. is a railroad corporation organized and incorporated under the laws of Congress, operating its road through the northern portion of the State of Texas and it denied under oath that either one of said roads at that or any other time were partners, acting as agent for the other in making contracts, etc., possessing only corporate powers as the law vested in them.

Fourth, that at the date of this injury, plaintiff's petition shows on its face that the I. & G. N. Ry. Co. was improperly joined as a defendant because there was no cause of action

against it and charged that it believed that the said suit was filed in Frio County against both of said defendants to secure said jurisdiction in said Court and in said County, and prayed to be dismissed from said suit, which plea was duly sworn to. (Record p. 8.)

Petition for removal was filed September 17th, 1912. (Record p. 11.) Bond for removal filed September 17th, 1912. (Record p. 14.) On the 14th day of October, 1912, after said cause had been removed and record filed in Federal Court, the Texas & Pacific Ry. Co., through its attorney, W. T. Armistead, filed its answer and plead, "that in case the plea in abatement filed by the other defendant (I. & G. N. Ry. Co.) herein, be sustained, that thereupon this defendant desires to and here now shows to the Court that it had no agent or representative in Frio County, Texas, when this cause of action accrued, nor when this suit was filed and that its line of railway runs from Texarkana via Marshall, Dallas, Ft. Worth, Abilene, Big Springs on to El Paso, Texas, several hundred miles north of Frio County, and that no part of its line traverses Frio County and that the action is alleged and the personal injury occasioned to have occurred in Cass County, Texas. Wherefore, the defendant, The Texas & Pacific Ry. Co., prays that this suit abate as to it."

It further plead that "in case the foregoing pleas are overruled by the Court, the defendant Texas & Pacific Ry. Co. demurs, etc."

Thereupon the defendant further answered said cause, which is not necessary here to state, as the cause was tried under amended answer filed by the said Texas & Pacific Ry. Co. (Record p. 18.)

On the 3rd day of January, 1913, plaintiff filed a motion to remand said cause, on the ground "this Court is without juris-

diction to hear and determine said cause." Defendants replied to said motion, that the said cause was one arising under the constitution and laws of the United States, in this, "that it is a suit against the Texas & Pacific Ry. Co., which is a corporation created by an act of Congress of the United States," and that the I. & G. N. Ry. Co. had an agent in Frio County, Texas, where the suit was instituted and that the case is one under the law removable, and which controversy between the parties, this Court has the sole and exclusive jurisdiction by virtue of the removal therein. (Record p. 22.) On the 6th day of January, 1913, the Court overruled said motion to remand. (Record p. 24.)

On the 9th day of January, 1913, the Texas & Pacific Ry. Co. filed its motion to continue the cause, joined in by the I. & G. N. Ry. Co., which was granted. (Record p. 25.)

On the 5th day of May, 1913, the I. & G. N. Ry. Co. filed its first amended pleas, demurrers and answer. It plead, as it had plead in its original answer, that it was improperly joined in the suit for the reasons stated and set out in its original answer, not necessary to here repeat, and that the case was improperly filed in Frio County because the law under which the same was filed was void. It plead an improper joinder as aforesaid, and that the suit was filed in Frio County against both defendants to secure jurisdiction in said Court and in said County. And further stated not waiving any benefit and advantage to be gained by said foregoing pleas, but insisting thereupon and subject thereto, in case they are overruled, comes and demurs, etc., and further answering generally denying its liability, because the matters and things set up in the Texas & Pacific Ry. Co.'s answer adopted, and that the plaintiff was injured by the T. & P. Ry. Co. and not through the fault and neglect of this defendant. (Record p. 29.)

On the 10th day of May, 1913, the Texas & Pacific Ry. Co.

filed its amended answer in lieu of its answer of the 14th of October, 1912. It plead precisely as pleaded in said original answer; pleas and denial of partnership under oath. Then plead "in case the foregoing pleas are overruled by the Court, that defendant T. & P. Ry. Co. demurs," etc. It answered, denying every allegation in plaintiff's petition contained and a plea of not guilty of the wrongs, injuries, etc. It answered and charged that the plaintiff after the alleged injuries, proceeded on her journey apparently unhurt, in as good condition as before the accident. That before the accident she seemed in a worse condition physically than she did thereafter. That she had two operations performed and alleged if from hurts received in the accident that the same was malpractice and wholly unnecessary, in which she acquiesced. That the coach was not derailed at the time of the accident that there was no occasion for her in that coach to have been hurt or even jarred any more than is usual or necessary in the operation of defendant's train, and no other person riding at that time was seriously hurt. That prior to the date of the alleged injury, she was not a well and healthy woman and had been under treatment for female trouble of some kind, taking various kinds of patent medicine, both internal and by local application.

The treatment plaintiff had and constant insistence and persuasion of others induced her to believe that she had a cause of action against the Texas & Pacific Ry. Co. for which she would recover large damages, and on account of such persuasions brought to bear upon her, she was induced to submit to the operation which was wholly unnecessary, or if necessary, it was on account of her previous condition. The accident was not the cause of the injury and if she is permanently injured by reason of such operation by the doctors of her own selection, such operation was, both on her account and that of her physicians' negligence and the proximate cause of her injury which resulted from conditions that existed theretofore, which affected plaintiff's

health prior to the date of her alleged injury, and any injury resulting from the operation and condition would not have occurred except from the result following her negligence in having said operation, which no person of ordinary care and prudence would have undergone; that notwithstanding the alleged act of negligence by the Railway Company, the present injury is not the direct and immediate result of said act following a natural and unbroken sequence, and therefore the railway company was not guilty of any negligence resulting from her alleged injuries which were the proximate result of said alleged accident of said defendant's train of cars, but was on account of her own carelessness and want of care in allowing the said operation to take place, which was the proximate cause of the injury.

Plaintiff was in poor health at the time of the accident complained of and had been for a long time, and that she had recovered from all injuries caused by the railway accident and the operation, when performed was caused by and was the natural sequence of, the disease she was suffering from before the accident, for the consequences of which the defendant is in no way liable. (Record p. 34.)

Further answering, defendant averred that if plaintiff was hurt by reason of the locomotive pulling the train leaving the track or running into a switch on a side track instead of the main line by some party unknown to this defendant, without any fault or negligence on its part, and that the locomotive was five or six car lengths ahead of the coach in which the plaintiff claims to have been riding.

The cause was submitted to the jury, who on the 16th day of May, 1913, returned a verdict for \$21,500.00 against the Texas & Pacific Railway Co. and in favor of the International & Great Northern Railway Co. (Record p. 58.) Upon which verdict a judgment was entered for said amount. (Record p. 58.)

The Plaintiff in Error during the trial on May 15th, 1913, filed a motion for postponement or continuance of said cause to enable defendant to meet certain proof (see Record p. 39), which was duly overruled. (Record p. 44). Plaintiff in Error duly filed petition for writ of error, bringing this case to Honorable Circuit Court of Appeals. (Record, p. 337). It filed assignments of error (Record p. 338); writ of error granted (Record p. 351); writ of error bond (Record p. 353); citation in writ of error (Record p. 357).

Said cause was duly carried to the United States Circuit Court of Appeals for the Fifth Circuit, argued and submitted on the 25th day of March, 1914, and decided by the said Court on the 16th day of April, 1914, without any formal or written opinion. (See Record pp. 360-361). Thereafter on the 22nd day of April, 1914, your Petitioner filed a Petition in said Court for Writ of Error; Assignment of Error and order allowing the Writ of Error, all of which were duly filed in said Court on the 22nd day of April, 1914, together with Bond on Writ of Error, etc.; all of which proceedings appeared on Record, pp. 361 to 372 inclusive, showing the grant of same.

For the convenience of the Court we make a very brief statement of the cause.

### BRIEF STATEMENT

Clara Hill, the plaintiff in this suit, a young woman, was residing in Frio County, Texas, engaged as a clerk in a store in the small town of Dilley. Desiring to visit her parents who lived in Queen City, she purchased a ticket from the International & Great Northern Railway Co. to go to the little town of Atlanta, where she met her father who took her home. On her trip, a collision occurred on the train at a little town on a Texas & Pacific track, called Kildare, and she said she was thrown



out of her seat, and fell in the aisle of the train. After this accident, she got off the train, walked around, examined the engines, took her seat after returning, and went on to Queen City to her father's home, leaving the train at Atlanta, travelling some ten miles. Afterwards, she complained of sickness and called in Dr. Strawn, a practicing physician at Queen City, who after treating her, finding her very nervous, induced her to go to a sanitarium at Texarkana in charge of Dr. Dale, where she was taken and remained about fourteen days. When she got there she claimed to have been real sick, nauseated and vomited, but Dr. Dale's medicine helped her and it was but a short while before she could eat something and retain the food. She said: "I became dissatisfied as I was among strangers and had never been away from home before. I thought if I had to die I would rather be back home with my people, but I was a whole lot better when I left the sanitarium but I had no more than arrived at home when I had another spell." (Record p. 111.) She would not return to the sanitarium for further treatment but was treated by Dr. Strawn again, and about the 24th of March she left Queen City to return to Pearsall. She was treated by Dr. Williamson, at Pearsall, who afterwards induced her to go to San Antonio to be examined by Dr. Kingsley, who performed the operation which defendant claims was wholly unnecessary to perform, as she would have gotten well if she had stayed at Dr. Dale's sanitarium at Texarkana or continued the treatment of the kind he was giving her, which she could have gotten at a sanitarium at San Antonio or anywhere else, she submitted herself to an operation which in the opinion of the majority of physicians was wholly unusual and unnecessary, and could not have been caused, as alleged by her, as the result of a **shock or concussion**. A more full reason will be given further on in the discussion of this case, in which, reference will be made to the testimony to support the defendant in this contention, which we believe was ample to show that she was not injured as stated, but if injured, the operation performed on her claimed to be the

remote cause, resulting from shock and collision, was wholly unnecessary and unnatural and unusual on a young woman like the defendant in error. Drs. Strawn and Dale were her own doctors, selected by her, where she lived with her parents.

In presenting this case to this Honorable Court it will be seen that the Assignments of Error in this record are precisely the same errors as were assigned in the United States Circuit Court of Appeals, with the exception of the last assignment in this Court, which is the 18th Assignment. The Assignment of Error in the United States Circuit Court of Appeals will be found on page 338 of this Record, and the Assignment of the Errors for review by this Honorable Court are the errors complained of, and are found on page 361 of this Record.

The First Assignment of Error is as follows:

#### FIRST ASSIGNMENT OF ERROR

(Rec. p. 361)

The Court erred in not sustaining the several pleas in writing of the defendants, which pleas are set forth in the pleading of defendants, and which were overruled by the Court, as recited in the judgment of the Court, and as further shown by bill of exception No. 1 herein, to the effect that the suit was originally and improperly brought in Frio County against the Texas & Pacific Railway Company because it had its domicile in the northern district of Texas, in Dallas County, Texas, having no railroad or local agent in Frio County, its co-defendant having a railroad and local agent in Frio County, but had its residence and domicile in Harris County, Texas, because the I. & G. N. Ry. Co. so having its local agent in said County did not justify the plaintiff to file its suit in said County against the Texas & Pacific Ry. Co., which said company was alleged to have

committed a tort and injury to the plaintiff upon the line of its railway, and there is no valid law that would justify the institution of said suit against the T. & P. Ry. Co., to hold it in said Frio County, and the District Court having the same power to pass upon said question of jurisdiction upon the said proper plea being filed, raising the same, and the privilege of said defendant to be so sued in its own district, was error of the Court in not sustaining, and dismissing the same, there being no valid law in Texas justifying such action.

## SECOND ASSIGNMENT OF ERROR

(Rec. p. 362)

The Court erred in excusing the jurors J. M. Vance and J. G. Lenz, because they stated they were opposed to "fake damage suit litigation," and thereby prejudiced to that extent, but that they were not opposed to legitimate cases, and said Vance and Lenz both being business men of San Antonio, and qualified jurors in every respect, and their statements as shown by bill of exception No. 2 does not render them incompetent jurors, the evidence showing that the jurors who tried said cause were also further prejudiced by certain facts developed in said cause, as shown in affidavits attached to bill of exception No. 11 upon the refusal of the Court to cut down said judgment or to grant a postponement thereof, as is likewise set out in bill of exception No. 3 on the application to postpone said cause, the said jurors, or some of them, who tried said cause were influenced and prejudiced, which might not have occurred if jurors of the character and stamina of said Vance and Lenz had been permitted to remain on said jury, they not having disqualified themselves, and it was error in the Court below to so hold, because they were opposed to "fake damage suit litigation"

### THIRD ASSIGNMENT OF ERROR

(Rec. p. 362)

The Court erred in refusing to postpone the case to give the defendants an opportunity to meet the charge against Dr. Dale, one of the leading witnesses for defendants against whom it was testified by Clara Hill, the plaintiff, that Dr. Dale had been guilty of improper conduct towards her while in the institution, which testimony being so prejudicial against defendants that defendants should have been allowed time to secure witnesses to contradict Clara Hill, and to sustain the good character and good name of said Dr. Dale, and to show by the witnesses, as was shown and set out in bill of exception No. 11 referred to as a part of this, that Dr. Dale was a man of irreproachable character, and that no opportunity for anything of the kind could happen, because the nurses were always present when he attended his patients, and said testimony could have no other effect than a prejudicial one against defendants, and if an objection to the admissibility of such testimony had been made thereto, whether sustained or not, would carry with it to the mind of the jury inferences that could not have been met by direct testimony, and no action of the Court in sustaining such an objection, or instructing the jury not to consider the same would have removed its prejudicial effect, it being one of those cases where an absolute contradiction could have been of no beneficial effect, and it was a matter of discretion wholly in the Court as to whether or not a postponement should have been given, the said Court lasting from May to and into July, and would have involved in all probability the continuance of not more than one or two days to procure such testimony. That the refusal of the Court as shown by the testimony in bill of exception No. 11, and purpose of such continuance being set out by a motion in writing in bill of exception No. 3, the Court exercised a harsh and injurious discretion against the defendants, as shown by the size of the

verdict, to-wit, \$21,500.00. All of said testimony would have gone, and did go to the weight and credibility of plaintiff's testimony, there being a sharp conflict between the plaintiff and other witnesses, especially Dr. Dale and Dr. Strawn, physicians who attended her immediately after the alleged accident, it being shown by said witnesses that she was, and would have recovered if she had remained under his, or some other like proper treatment. (See Bills of Exception Nos. 3 and 11.)

#### FOURTH ASSIGNMENT OF ERROR

(Rec. p. 363)

The Court erred in refusing to charge the jury peremptorily to find for the defendants, as requested by them in Charge No. 1, Bill of Exception No. 5, which is as follows:

"You are instructed that unded the evidence you will find a verdict for the defendant (Texas & Pacific Ry. Co.) because such injuries as plaintiff sues for could not be, and were not the direct and proximate cause of the collision and shock, if any, to plaintiff."

#### FIFTH ASSIGNMENT OF ERROR

(Rec. p. 363)

The Court erred in the first paragraph of its instructions, as follows:

"In this case I charge you that the evidence has not developed any liability on the part of the defendant, International & Great Northern Railway Company, and I therefore charge you that you must return a verdict for this company, and proceed to consider the case against the Texas & Pacific Railway Company, under the following instructions:"

## SIXTH ASSIGNMENT OF ERROR

(Rec. p. 363-4)

The Court erred in its general charge, as follows:

"If you believe from the evidence that the plaintiff directly received any of the injuries alleged in her petition by reason of said collision, then I charge you that your verdict must be for the plaintiff in such a sum as will fairly compensate her for any injuries as were received and as set forth and claimed by her in her petition; and in assessing damages you should take into consideration the reasonable expenses which the plaintiff has incurred for drugs, hospital services, and medical and surgical treatment which you may find were reasonably necessary in the proper treatment of any injuries which you may find she received. In estimating such damages, you will also take into consideration the mental and physical suffering, if any, which the plaintiff has undergone by reason of any such injuries; and if you find that any such injuries are permanent, you should also consider any mental and physical suffering which any such injuries will produce upon plaintiff in the future. And if you find that any such injuries are permanent, and that they will diminish the plaintiff's capacity to labor and earn money in the future, then I charge you that this element of damages also should be considered."

## SEVENTH ASSIGNMENT OF ERROR

(Rec. p. 364)

The Court erred in that portion of its charge, as follows:

"In this case the defendants charge that the operation and removal of the plaintiff's ovaries was unnecessary, and that the surgeon who performed said operation was guilty of malpractice. In this connection I would charge you that the plaintiff would not be responsible for the errors or mistakes of the surgeon who

performed the operation, provided she used ordinary care in the selection of a reasonably competent surgeon, and did select a reasonably competent surgeon, and submitted her case to his judgment. If you find from the evidence that the plaintiff received hurts in said collision which led to the injury and impairment of her ovaries, and if you further find that she used ordinary care in the selection of a reasonably competent surgeon, that is, such a care as a person of ordinary prudence would have exercised under similar circumstances, and did employ a reasonably competent surgeon to perform said operation, and that he, acting upon his judgment, removed her ovaries, then I charge you that the defendant would be liable for the condition produced by reason of said ovaries being removed, notwithstanding some other course pursued by the surgeon might have saved the removal of her ovaries."

#### EIGHTH ASSIGNMENT OF ERROR

Rec. p. 364-5)

The Court erred in submitting to the jury the question as to whether or not the plaintiff received hurts in said collision which led to the injury or impairment of the ovaries, without instructing the jury that such injuries could only result from causes alleged by plaintiff to come from a shock or concussion, and again has made her right to recover depend upon the selection of a person of ordinary care and prudence to perform the operation, whether it was required or not; and makes the case depend upon whether or not the surgeon who performed the operation was justified or not in performing same would entitle her to recover, notwithstanding some other course pursued by the surgeon might have saved the removal of her ovaries.

#### NINTH ASSIGNMENT OF ERROR

(Rec. p. 365)

The Court further erred because in the general charge it did

not submit all the issues in the cause and especially the defenses asserted and presented by defendants in their answer all of which exceptions to the general charge of the Court, above enumerated, were noted at the time, and preserved in bill of exception No. 4.

#### TENTH ASSIGNMENT OF ERROR

(Rec. p. 365)

The further errors in the general charge of the Court was instructing the jury that the plaintiff would not be responsible for the error and mistakes of the surgeon who performed the operation, provided she used ordinary care in the selection of a reasonably competent surgeon.

Our contention in this connection being:

(a) Whether the particular operation was necessary was an issue for the jury, on defendant's proof, to determine and the Court should have submitted to the jury, whether or not she used proper care in first ascertaining, by making preparation for the restoration of her health, before selecting any surgeon to perform any such operation:

(b) Whether her condition required the operation:

(c) Whether the operation was eventually made by a doctor who removed more of the plaintiff's organs than were necessary, to restore her to health:

(d) Whether she received the injury, if any, on the train, which was or was not, such as to cause the condition, stated, by the surgeon, who performed the operation, the plaintiff having alleged she received a **severe shock and concussion** and by reason thereof, her nervous system was severely shocked and injured and impaired, and did not then claim to be injured. It is nowhere alleged that she **was hurt** on account of the collision



or that she received hurts in said collision, and the only injuries she received, pleaded by her, were injuries received from "**shock and concussion**" and not by any other injury that hurt her. The Court's attention was called specifically to the failure of plaintiff to allege any hurt or injury other than was occasioned by a severe shock, and it was upon this petition that the case was tried, and the Court erred in submitting any other injury than alleged for the consideration of the jury.

(e) And the Court erred in making, as the Court did, the plaintiff's cause of action on account of the operation and her recovery therefor, depend as to whether she employed, "a reasonably competent surgeon to perform said operation." Refused to submit any issue as to whether she ought to have used ordinary care in relieving herself from such injuries before going under the surgeon's knife, or using ordinary care in avoiding an operation, rather than her right to recover for the injuries done her, if she did employ "a reasonably competent surgeon to perform said operation," and not leaving for the jury to say whether she ought to have been operated upon or not.

(f) The Court refused to submit in its general charge to the jury, defendant's defense that she was induced to submit to the operation, whether necessary or not, or if the operation was wholly unnecessary, or whether it was on account of plaintiff's condition prior to the time when the operation was made upon her.

(g) That the plaintiff had gotten well and recovered from the effects of the injury and that the operation upon her was not the direct and immediate result of the injury caused by the "shock or concussion" in the alleged accident, but was on account of her own carelessness and want of care in allowing the said operation to take place, which was the approximate cause of the loss of her ovaries.

### ELEVENTH ASSIGNMENT OF ERROR

(Rec. p. 366)

The Court erred in refusing to give special charge No. 2 set out in bill of exception No. 6, requested by the defendants, as follows:

"If under the instructions herein given you, you find for the defendant, the International & Great Northern Railway Company, I further charge you that you cannot find for the plaintiff against the Texas & Pacific Railway Company, and you will so find."

### TWELFTH ASSIGNMENT OF ERROR

(Rec. p. 366)

The Court erred in refusing to give special charge No. 3 set out in bill of exception No. 8, requested by the defendants, as follows:

"Defendants request the Court to charge the jury that if they believe the train upon which plaintiff claims to have been hurt, did get off the track or rather run into a switch on a side track unexpectedly, as the switch was set for the side track instead of the main line by some party unknown to the defendant and without any fault or negligence on its part, then you will find for the defendant."

### THIRTEENTH ASSIGNMENT OF ERROR

Rec. p. 366)

The Court erred in refusing to give special charge No. 5 set out in bill of exception No. 7, requested by the defendants, as follows:

"If you believe from the evidence that the plaintiff had the operation performed, as alleged on account of hurts received in the accident, you cannot consider any injury that came to her from the same unless as a result from the shock received in said train or from concussion, there being no allegation in plaintiff's pleading that the injury was received in any other way; and in considering the injuries received from them or from the collision, you will disregard every element of injury that could flow entirely from traumatism, that is, a blow of some kind."

#### FOURTEENTH ASSIGNMENT OF ERROR

(Rec. p. 367)

The Court erred in refusing to give special charge No. 6 set out in bill of exception No. 9, requested by the defendants, as follows:

"If you believe that the plaintiff's condition as alleged by her, was brought about by reason of her prior condition and her acts and conduct thereafter, and any injuries resulting from the operation, and the others would not have occurred except for the result of her own negligence in having said operation performed, as no person of ordinary care and prudence would have undergone, and notwithstanding the alleged act of negligence upon the part of the railroad, the present injuries are the direct and immediate result of said act, following in natural and unbroken sequence, and the railroad company was not guilty of any negligence resulting from her alleged injuries which were the proximate result of her said accident in the defendant's trains of cars, but was on account of her own carelessness and want of care in allowing said operation to take place, which was the proximate cause of her injuries, you will find for the defendant."

FIFTEENTH ASSIGNMENT OF ERROR

(Rec. p. 367)

The Court erred in refusing to give special charge No. 9 set out in bill of exception No. 10, requested by the defendants, as follows:

"You are instructed that if you believe from the evidence that at the time the plaintiff was operated upon that she was a neurasthenic and was suffering from neurasthenia, and that she was influenced to submit herself to a surgical operation when it was not necessary and when other treatment would have entirely cured and relieved her, and that she did not use and exercise ordinary care, and such want of care, if you believe she did not exercise proper care, caused her to select a doctor when it was not necessary, and that her act contributed to the injury, then the railroad company would not be responsible in damages for the consequences of the operation that was performed upon her; and you will in summing up the amount of damages you find she was entitled to, if any, not consider the operation upon her and the removal of any other organs in finding a judgment and assessing damages against the defendant, but will only assess such damages against the defendant, as arose from the injury otherwise than as hereinabove instructed."

SIXTEENTH ASSIGNMENT OF ERROR

(Rec. p. 368)

The said verdict was excessive, and outrageously high, and shows that the same was the result of prejudice.

SEVENTEENTH ASSIGNMENT OF ERROR

(Rec. p. 368)

The Court erred in refusing to grant the defendant a post-

ponement or continuance, and to cut down the said excessive verdict, as shown by bill of exception No. 11, which bill of exception No. 11 was asked to be considered in connection with the 3rd assignment of error, and 3rd bill of exception, because the Court had it in its power to remedy the wrong by either granting a new trial, as it was requested or a postponement of the case because the evidence showed from the affidavits of the nurses, Kathleen Childress, Miss Nelson and Miss Ester and their reports of the condition of Miss Clara Hill, plaintiff, while she was in said hospital, and by the affidavits of other witnesses, that Dr. Dale was a man of irreproachable character, and it was impossible for him to have treated Miss Hill improperly, as he was never with her alone, and because the evidence showed that she was improving and getting well, and further the affidavits of the jurors attached to this bill of exception shows improper conduct on part of the jurors, and all of which matters were within the sound discretion of the Court, and are matters for consideration for this Court upon the whole case, and as to whether or not the Court exercised an unfair and unjust discretion toward the petitioner in not postponing said cause to enable your petitioner to meet the issue so improperly raised, whether it was within the right of cross examination of plaintiff, or whether plaintiff had a right to introduce such testimony as explanatory of the reason why she did not return to said sanitarium for treatment, and said treatment was material to defendant's defense upon the issue raised in the motion to continue or postpone to enable the defendant to properly meet said defense, all of which testimony and affidavits upon the point is set out in bill of exception No. 11, to which reference is made.

#### EIGHTEENTH ASSIGNMENT OF ERROR

(Rec. p. 368)

The Honorable Court of Appeals erred in not writing an opinion covering the Assignments, or some of them, set forth and contended for, for this.

It cannot be determined from the opinion of the Court, the views of the Court upon each of said assignments and the said questions involved are of such importance and magnitude as to justify a written opinion.

Wherefore your petitioner prays that this Honorable Court will herein consider the foregoing assignments of error, and will adjudge and decree that the said verdict and judgment thereupon to be wrong, and will reverse the same, and send the case back to the United States District Court with instructions to proceed in accordance with its opinion. If the Court shall not reverse said cause, and will follow the Texas statute governing the Appellate Courts in said State, that then this Honorable Court will exercise its power and authority to reduce said judgment, which is unreasonably excessive.

We supplement the assignments with propositions of law growing out of the same, and submit proposition or points of law arising upon the same for the consideration of the Court.

#### FIRST POINT OF LAW

##### Assignment of Error No. 1, Record page 361)

The Court erred in not sustaining the several pleas in writing of the defendants, which are expressly set forth in all of the pleadings, to the effect that the Court had no jurisdiction in this case and suit was improperly brought in Frio County, the Texas & Pacific Railway Co. having its domicile in the Northern District of Texas at Dallas, and no local agent or railroad in Frio County, and the International & Great Northern Railway Co. having its domicile in Houston, Harris County, and the tort having been committed on the line of the Texas & Pacific Railway Co., if any, was committed in the Northern District of Texas out of the jurisdiction of the District Court

of Frio County, and there was no valid law to authorize or justify filing or maintaining the suit in Frio County. See judgment of the Court where the objection to the ruling of the Court was reserved, Record page 59, and which was likewise reserved in bill of exception No. 1. (Record page 76.)

### STATEMENT OF FACTS

The Court qualified the bill of exception No. 1, while it may not have been necessary to save the benefit of the error by a bill of exception as it was reserved by the judgment of the Court itself. The qualification of the Court is in this language: "The Record in said cause was filed in this Court for the December term, 1912; that at said term of this Court both defendants made a general appearance without reservation and pleaded to the merits of the cause," is not justified by the record. We positively take issue to this statement of the judge because it is in conflict with the record and our pleas, which show for themselves. The judge overlooked these facts. It is contained in the Record. (See Record pp. 8, 18, 29 and 33.) The record made by the Court at the time must control or cease to be of value as against the subsequent recollections of a judge after a long lapse of time, by qualifying a solemn record.

We contend that the suit was improperly brought in Frio County upon the ground that the statute under which the plaintiff brought the suit **was never intended to fix venue in cases of personal injuries**, but for other character of damages than personal injuries, as the venue for the personal injury suits was fixed by another statute. The statute under which the suit was brought, including caption, being an act of the Twenty-ninth Legislature 1905, page 29, is as follows, to-wit:

“RAILROAD CORPORATIONS—AMENDMENT, PRE-  
SCRIBING PARTIES TO AND VENUE OF  
SUITS AGAINST

(H. B. No. 57)

Chapter 25

An Act to amend Section 1 of an Act approved May 20th, 1899, entitled “An Act to prescribe the parties to and venue of suits against railroad corporations and assignees, trustees and receivers operating any railway over whose transportation lines, or parts thereof, any freight, baggage or other property has been carried during transportation,” so as to prescribe the parties to and the venue of suits against railroads, express or transportation companies or common carriers of any kind, or the assignee, lessee, trustee or receiver of any such, operating or doing business in this State, where any damage, loss or other cause of action arises, out of the transportation or contract in relation to the carriage of passengers or freight, baggage or other property, and providing for the apportionment of the damage recovered between the defendants, and providing additional means of obtaining service on non-resident corporations or companies having agents in this State.

SECTION 1. Be it enacted by the Legislature of the State of Texas: That whenever any passenger, freight, baggage or other property has been transported by two or more railroad companies, express companies, steamship or steamboat companies, transportation companies, or common carriers of any kind or name whatsoever, or by any assignee, lessee, trustee or receiver thereof, or partly by one or more such companies, or common carriers, and partly by one or more assignee, lessee, trustee or receiver thereof operating or doing business as such common carriers in this State, or having an agent or representative in this State, suit for damages or loss or for any other cause of action arising out of such carriage transporta-



tion of contract in relation thereto may be brought against any one or all of such common carriers, assignees, lessees, trustees, or receivers so operating or doing business in this State, in any court of competent jurisdiction in any county in which either of such common carriers, assignees, lessees, trustees or receivers operates or does business, or has an agent or representative; provided, however, that if damages be recovered in such suits against more than one defendant, not partners in such carriage, transportation or contract, the same shall on request of either party be apportioned between the defendants, by the verdict of the jury, or if no jury is demanded, then by the judgment of the court."

It does not by words or language pretend to affect the general law of 1901 fixing venue to personal injury suits, but is a proposed amendment of the law of 1899 on another subject other than personal injury.

The Statute with reference to fixing the venue for personal injuries against railroad, was passed in 1901, page 31, and is as follows, to-wit:

"RAILROADS—FIXING VENUE OF SUITS AGAINST  
(S.S.B.No.35) Chapter XXVII

An Act to fix the venue of suits against railroad corporations or against any assignee, trustee or receiver operating railways for damages arising from personal injuries, resulting in death or otherwise, and to repeal all laws and parts of laws in conflict with the provisions of this act.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. That all suits against corporations, or against any assignee, trustee or receiver operating any railway in the State of Texas, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either

in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of injury; provided, that if the defendant railroad corporation does not run or operate its railways in or through the county in which plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent; and provided further, that in case that the plaintiff is a non-resident of the State of Texas, then such suit may be brought in any county in which the defendant corporation may run or operate its railroad or may have an agent; provided, that when an injury occurs within one-half mile from the boundary line dividing two counties suit may be brought in either of said counties.

It has nothing to do with Act of 1899 and its amendment of 1905, nor that Act with this—both Acts should be harmonized which would not be done if personal injury suits could be maintained under either.

#### AUTHORITIES

These statutes have now been brought forward in Revised Statutes, 1911, as subdivisions 25 and 26, Article 1830. We are not unmindful that this statute was sustained as a venue statute in the case of *Railway vs. Blanks*, 125 S. W., 312; *Railroad vs. Landan, et al*, 124 S. W. 746 and *I. & G. N. Ry. vs. Doolan*, 120 S. W. 1120, but no question was raised as to its validity, applicability or pertinancy, nor passed upon in personal injury suits. If intended as a venue statute in cases where railroads are jointly sued for personal injury tort committed by another railroad solely in the nature of a personal injury, then it must be held to conflict with the Act of 1901, *supra*. It cannot be

regarded as an amendment to the law for it would not be in accordance with that provision of the Constitution of Texas, Article 3, Section 36, which provides, "no law shall be revised or amended by reference to its title but in such case the act revised or the section or sections amended shall be re-enacted and published at length." It is therefore clear that it is not an amendment of any act nor intended to be growing out of personal injuries. If it undertakes to fix the venue of personal injury suits, it is in conflict with the other law. Hence, we take it in order that the whole law may stand it must comply with the provision in Texas Constitution, Article 3, Section 35, "no bill shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to show which thereof as shall not be so expressed." It is easy to harmonize both these laws and let them stand. For instance, say the Act of 1905 pertains solely to damages, such as loss of baggage or otherwise belonging to passengers as it does, as it purports to amend the Act of 1899 on that subject and not the law of 1881, and the other Act of 1881 remain fixing the venue for personal injuries. In Doolan case *supra* the court said, "that the same did not undertake to fix liability as against connecting carriers." (P. 1120). Judge Maxey evidently took this view by dismissing the I. & G. N. from this case. See Constitution of Texas, annotated from pages 253 to 278 inclusive.

Our contention here is, there would be no waiver of a jurisdictional question by a removal proceeding, since the point was timely raised attacking the validity of the law in the Federal Court which could be done as the T. & P. filed no pleading in the State Court. Our plea was to dismiss the case—not to remand but drive them out of court, and require suit brought in proper county, in the proper jurisdiction. Yet the Court held the T. & P. Ry. Co. in as the sole defendant, dismissing the

other, when as to it there was no original right to sue in Frio County.

The T. & P. Ry. Co. did not waive its plea of jurisdiction or venue by adopting pleading of its co-defendant. It filed no pleading in the State court not acted upon until the Federal Court disposed of it by an instructed verdict, the effect of which was to support its contention.

In *Texas & Pacific Ry. Co. vs. G. H. Lynch*, 97 Texas Reports, at page 25, a case cited by counsel in the court below as supporting his contention that the plea was not properly raised and if so was waived, does not support such contention but is a case directly in point as supporting our contention. That suit was brought under the Act of 1899, and the Act under which defendant in error's suit was brought was under what was supposed to be an amendment to that very act. In discussing the case of *Texas & Pacific Ry. Co. v. Lynch*, at page 30 the Court said:

"We are further of the opinion that the Act of May 20, 1899 (Laws 1899, p. 214), has no application to the case as made by the defendant's plea of privilege. It may be doubted whether it was the purpose to make the act applicable to any case except to those of damage to property in course of transportation; but the words "or other cause of action connected therewith" are very broad, and it is difficult to say that they do not embrace injuries to the person of one accompanying a shipment of cattle where the right of transportation is given in the contract of shipment. But we need not decide that question. Before the passage of the act, it was a matter of not infrequent occurrence that live stock which had been shipped over two or more lines of railroad under separate and independent contracts arrived at their destination in a damaged condition and the shipper was at a loss to know how

much of the damage was chargeable to the one line and how much to the other, or others, in case there were more than two. The evident purpose of the act was to relieve shippers of this difficulty, and to provide a joint action against all the carriers where there was a reasonable probability that each was responsible for some part of the whole damage. But, in our opinion, it was not intended to authorize a suit against two railroad companies not acting under a joint contract, for the distinctly separate wrong of one, merely because property had been transported over the connecting lines of the two. It would, in our opinion, be difficult to justify such legislation upon any correct principle. If for example the cause of action was against the second carrier company for a total destruction of property on its line by a railroad wreck, why sue the first, who did not contract to carry beyond its own line and was in no manner responsible for the loss of the property? So in this case, if it be true as alleged in the plea and as admitted by the agreement, that there was no joint contract, there was no joint liability nor any question of apportionment of damages to be settled. We are therefore of the opinion that it was not intended that the statute should apply to such a case.

"We also think that this was an action for personal injuries within the meaning of the venue act of March 27, 1901. (Laws 1901, p. 31.) According to the case made by the petition the right of the plaintiff and the duty of the defendant grew out of the contract of carriage, but the mental and physical pain suffered by him by reason of his ejection from the cars are personal injuries, such as are recoverable only in an action of tort. The plea avers that the ejection occurred in Bowie County, and under the statute the plaintiff could have sued and may yet sue in that county. Therefore the plea complies with the rule, which requires that a plea in abatement shall give the plaintiff a better writ. It

does not deprive the plaintiff of his right to sue either in that county or in the county nearest "that in which the plaintiff resided at the time of his injury."

"Accordingly the judgment should be reversed and judgment here rendered sustaining the plea of privilege and abating the suit, and it is so ordered."

It will be observed that Judge Gaines in the above stated cause, just as we are contending here, states that the Act of 1901 was an act which fixed the venue in cases of personal injuries. This is our contention, and the Act of 1905 was not intended to, nor did it change or vary the law in force with reference to suits for personal injury and "mental and physical pain suffered by him by reason of his ejection from the cars are personal injuries such as are recoverable only in an action of tort." Clearly, under this act no suit could be brought for personal injuries outside of the domicile of the Texas & Pacific Ry. Company. If the pleadings which raise the question were not sufficient, or that the Plaintiff in Error waived the same, that question should have been taken advantage of in the trial court, either by exception to the pleading and raising the question of waiver to prevent the Court from passing upon the question: It was done in neither way. It was not contended there that the railroad had waived its plea, neither was it contended that the pleadings were not sufficient to raise the question.

In *Railway Company v. Doolan, et al*, 120 Southwestern, page 1120, the Court said:

"We agree with appellants as to the second objection urged, for the reason stated. There was no pleading nor proof of partnership between the defendants, nor that the

agent at Rockdale represented any one except the International and Great Northern Railroad Company. The ticket purchased by Mrs. Doolan contained the following provision: "In selling this ticket for passage over other lines this company acts only as agent, and is not responsible beyond its own line." Certainly the Houston & Texas Central Railroad Company could not be held liable for the alleged mistake of the International & Great Northern Railroad Company in selling Mrs. Doolan the wrong ticket, unless there was some proof of partnership, or that the agent at Rockdale represented both companies. Counsel for appellee, in support of his contention that both companies are liable, relies upon the case of *Blanks v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 116 S. W. 377, lately decided by this court. A writ of error, however, has been granted therein by the Supreme Court, in which it is still pending. That case, however, does not undertake to pass upon the point here presented. It was there expressly held that the statute of 1905, then under consideration, was simply a venue statute, regulating the venue in which suit might be brought, but that the same did not undertake to fix liability as against connecting carriers. Nor is the contention of appellee sustained by the provisions of article 331a and 331b of the Revised Statutes of 1895 as amended (see *McIllwaine's Digest*, p. 65) for these statutes regulate the liability of common carriers only with reference to freight, and no mention is made of their liability so far as the carriage of passengers is concerned. See also *Moore v. M. K. & T. Ry. Co. et al*, 18 Tex. Civ. App. 561; 45 S. W. 609; *Harris v. Howe*, 74 Tex. 534; 12 S. W. 224; 5 L. R. A. 777; 15 Am. St. Rep. 862."

In the case of *Railway Company vs. Landon*, 124 S. W. 746, the court said:

"The Court's charge, in effect, assumed the liability of all

of the defendants for the negligence of any one of them resulting in the injury of the passenger while traveling on any of said lines on said ticket. This we think was correct. *Railway v. Lynch*, 97 Tex. 25; 75 S. W. 486; *Blanks v. Railway*, 116 S. W. 377. And we therefore overrule all the propositions in appellant's brief which assert that, the injury occurring on the line of one of these defendants, the others were not equally responsible."

In the case of *Railway v. Blanks*, 125 S. W. at page 313, the Court said:

"The Twenty-ninth Legislature passed an act which was approved March 13. 1905, which stripped of unnecessary verbiage as applied to this case, reads as follows: "Section 1. Whenever any passenger has been transported by two or more railroad companies having an agent or representative in the state, suit for loss or damage arising out of such carriage may be brought against any one or all in any court of competent jurisdiction in any county in which either of such common carriers operates or does business or has an agent or representative," etc. Laws 1905, p. 29. Now, it is to be observed that the language is not that suit may be brought against all of such common carriers, but is that it may "be brought against any one or all of such common carriers." Now, "any one" being used in the singular sense, we think there could have been no doubt as to the construction. It follows that a principal object of the statute was to fix the venue of such suits; and we think that it is fixed in such explicit terms that its meaning cannot be mistaken. In other words, the statute says that either company may be sued in any court which has jurisdiction ordinarily over the other company or companies. In case of such plain language we do not feel at liberty to disregard it."



In this case the validity of the Act was not questioned or passed upon, nor its conflict with the Act of 1901 presented to the Court. The only question presented to the Court was purely and simply a question of venue. and there was no question in the case other than that.

In *Railway v. Wester*, 96 S. W. 773, the Court said:

"We do not concur in the contention and views expressed by counsel for appellant. The provisions or requirements of the statute in question are in no sense a regulation of commerce. The first section of the act simply prescribes the parties to, and venue of, suits against railroad corporations operating or doing business in this state or having an agent or representative in this state. It provides that, whenever freight has been transported by two or more such corporations or partly by one, or more of them operating or doing business as common carriers in this state, or having an agent or representative in this state, suit for damages or loss, or for any other cause of action arising out of such carriage may be brought against any one or all of such common carriers in any court of competent jurisdiction in any county in which either operates or does business, or has an agent or representative. Sections 2 and 3 provide additional means of conductors who are engaged in handling trains and agents obtaining service on foreign or non-resident corporations having agents in this state, by designating for that purpose engaged in the sale of tickets, or making contracts for the transportation of property as agents of such foreign corporations, upon whom such service may be had. This statute, in our opinion, does not impose any such burdens upon interstate commerce as distinguished from commerce within the state, as amounts to an infringement upon the power of congress to regulate interstate commerce. It is, we think, a legitimate exercise of the police power of the state in mat-

ters which concern the regulation and control of its internal affairs only, and "does not, in the sense of the Constitution, intrench upon any authority which has been confided to the national government."

The case of *Blanks v. Railway*, 116 S. W. page 380 is a very lengthy opinion discussing all the authorities sustaining the validity of the act fixing venue in suits against all the railroads as connecting carriers.

In the case of *Knoles vs. Clark*, cited in 163 S. W. page 369, there is a full discussion by the State Court, construing the Texas statute, holding that the plea of privilege to be sued was properly raised by an exception. Such is the ruling of the Federal Court we have cited, *supra*.

As contrary to the contention of counsel below asserting that under the general statute, where one defendant resided in a particular county, that another defendant may be joined in said suit where he has not contracted or promised to pay the debt of another. See *The Behrends Drug Co. vs. Hamilton & McCarty, et al*, 92 Tex. page 284, by the Supreme Court, holding it cannot be maintained; and also the case of *Goggan vs. Morrison*, cited in 163 S. W. page 123; and *Rayland vs. Insurance Company*, 157 S. W. 1178.

The point is well settled against counsel's contention.

That the question of jurisdiction was properly raised and preserved see:

*O'Connell vs. Reed*, 5 C. C. A. 593.

## SECOND POINT OF LAW

(Assignment of Error No. 2 Rec. p. 362)

(Bill of Exception No. 2, Rec. p. 79)

It was error to excuse the jurors, J. M. Vance and J. G. Lentz because they were opposed "to fake damage suit litigation," but were not opposed to legitimate damage cases for they were qualified jurors; and by reason of their being discharged, defendants were compelled to take other jurors, who were prejudiced, and admittedly influenced, unreasonably by the testimony against defendants.

### AUTHORITIES

On the question of competency of Jurors, counsel cited in his brief below as sustaining his contention, the case of *Mima Queen v. Hepburn*, 7 Cranch U. S. 297-298. That case does not bear out the contention of counsel in this case. The Court said: "He avowed his detestation of slavery to be such, that in a doubtful case, he would find a verdict for the plaintiffs." In our case it was a prejudice against "fake cases," and not a prejudice against the case at bar and not against damage cases *per se* generally; and what honest man has not such a prejudice?

This case is cited in *Rose Notes on U. S. Reports*, Vol. 1, page 521, and cases collated. See *Commonwealth v. Brown*, 9 *American State Reports*, page 746. See especially the note discussing this subject. These decisions and the notes constitute a most full and complete discussion on the subject, of bias of jurors and are worth reading.

*Southern Pac. Co. vs. Rauh*, Vol. 1, C. C. A., 417.

### POINT OF FACT

(See Bill of Exception No. 2, Record p. 78)

The direct examination of Mr. J. M. Vance, the juror, was not taken down as the stenographer was called after Mr. Vance,

the juror, was being interrogated by the defendant. Mr. Vance stated on cross examination that he was a large property owner in San Antonio. He had stated that he had prejudice against such personal injury cases but upon examination and explanation he stated his prejudice was against "fake damage suits," and qualified it in reply to the court, that he did not mean to say that he had prejudice if the case was a bona fide case; that is what he told Mr. Carter. He said he would be absolutely fair and governed by the testimony and charge of the Court and when he said he had prejudice he meant "he had prejudice against these fake damage suits;" that he would be entirely influenced by nothing but the testimony and the charge of the Court and it would not take any more testimony in this case than in any other case and stated he would be governed wholly and entirely by the evidence and the charge of the Court. When Mr Carter again questioned him, he stated:

A. "I have a prejudice against faked up suits."

MR. CARTER: "But you understand your mind is a very delicately constructed machine and it is more than apt to lapse and fail on account of a great number of faked suits; and when you went into the jury box you would be inclined to watch carefully to see if this was not a fake suit and might not take more evidence in that case than it would in some other? Didn't you state that?"

A. "Well, it might."

MR. CARTER: "Now, that is the same question Your Honor, Mr. Vance is a most admirable man——"

THE COURT: "I will excuse Mr. Vance, you may except to it."

JUDGE COBBS: "Note our exception to the Court's ruling." (Record, p. 81).

MR. LENTZ testified on his examination by the plaintiff:

Q. "Have you any prejudice against personal injury suits?"

A. "I am in Mr. Vance's position; that is about my view."

Q. "In other words, you would testify just about what Mr. Vance testified was his position?"

A. "Yes, sir."

THE COURT: I will excuse him.

On cross examination Mr. Lentz stated he had lived here about eighteen years, a property owner here, doing business in San Antonio. He stated: "I merely feel I have a little prejudice against suits for damages, but of course, I feel I could render a verdict according to the evidence in any damage suit but I think I am prejudiced." When he was asked what he meant by prejudice, he stated: "I always feel that there are so many fake damage suits."

"Then you feel that your prejudice is against fake damage suits?"

A. "Entirely."

Q. "And if the evidence shows this is a bona fide case you would be governed by the testimony and the charge of the Court?"

A. "Yes, sir."

Q. "Would you go into the jury box with a feeling that you couldn't do justice to both parties?"

A. "No, I don't think I would."

Q. "You think you could go into the jury box and return a fair and impartial verdict?"

A. "Yes, sir."

Q. "Mr. Lentz, you might have a prejudice against murderers generally?"

A. "Yes, sir."

Q. "But you could go into the jury box and try him fairly?"

A. "That is my position.

Q. "You could do that if he was charged with larceny?"

A. "Yes, sir."

Q. "Yet as between the man and the State you could do justice?"

A. "Yes, sir."

Q. "Why couldn't you do the same thing in damage suits?"

A. "I believe I could."

Q. "Then you mean that although you have prejudice against fake suits you would not have prejudice against a fair suit?"

A. "No, sir.

THE COURT: "Well, I think you are all right.

Q. "Well, what would you do with that prejudice when you had it?"

A. "Well, I don't know."

Q. "Well now, if you will be just candid and honest, the way to do Mr. Lentz is to come right out and tell His Honor, You have this prejudice, you admit?"

A. "Yes, sir; I have felt myself a little that way."

Q. "You will take it into the jury box?"

A. "I presume I would."

Q. "Then when you went into the jury box you would be inclined to watch carefully—very closely to see whether this was a fake suit?"

A. "Yes, sir."

Q. "Now then, you think that being in that attitude it would take more evidence in a case like that than it would in another case where you would not have those prejudices—that attitude?"

A. "Well, I can't say whether I would or not, I couldn't say." On re-direct examination, he stated:

Q. "And your scrutiny would be in cases of this kind, it would be closer than in the average case?"

A. "Well, it would be close in any case."

Q. "Well, you stated a while ago you didn't know whether it would require more evidence or not."

A. "No, I don't know."

THE COURT: "This is a case where the plaintiff claims

to have been injured as a passenger in a head-on collision. Have you any prejudice one way or the other?"

A. "I don't know. I haven't considered the matter sufficiently to answer."

THE COURT: "Well, you will be excused." (Record, p. 85).

### REMARKS

We submit that the Court erred in not holding these jurors qualified and it was error to excuse them peremptorily for cause; the cause being in effect, that they had **prejudice against fake damage suits.**

We cannot conceive of any reason why such a man as Milton Vance and Mr. Lentz would be excused from any jury service. Mr. Vance, born and raised here, one of our most wealthy and leading citizens. It is a sad travesty on jury service that an honorable man like Mr. Vance is denied the privilege of sitting on a jury because opposed to fake damage suits, instead of being a reason to exclude a man, it seems to be an argument in its favor. Again, that Mr. Vance, or that Mr. Lentz, on account of so many damage "**fake suits,**" as they say, are inclined to scrutinize closely but emphasize the fact that they are honorable men, and intend exercising great care in seeing that any case upon which they are called upon to sit, there is no element of fraud or bad faith. What is a jury for except to weigh the testimony and to pass upon the credibility of witnesses? We venture the suggestion that a juror who would say he thought every case where a person was injured, the road should pay for it, but that in the trial of the case he would be governed by the evidence and charge of the Court and could render a fair verdict, yet he believed that a railroad ought to pay all damage suits is far more



objectionable. Yet many have so answered and yet retained over defendants' objection. We merely make this illustration for the simple reason of showing that jurors have been taken time and time again and regarded as qualified by our District Courts, and they may be. Still they would have a greater prejudice in favor of litigants generally against railroads than such men as Vance and Lentz would have against damage suits generally. We believe that these men were qualified jurors. We believe it to be the duty of jurors to scan every case carefully to see that no element of fraud or bad faith is in it as well as to find and fix the liability of railroads in cases where they ought to be made to pay it. No one ought to be afraid of a juror who says that he has a prejudice against a fake case in a Court of justice, because no suits should be brought with an element of bad faith in it that would require the exclusion of a juror who would be opposed to such litigation. We submit under the testimony of these two jurors, that they were competent and qualified. The question arises as to whether or not the defendant was prejudiced on account of not having a fair trial with competent jurors. In support of this, we wish to call the Court's attention to the conduct of the jury.

Mr. O. E. Lacy, one of the jurors, stated that "after the case had been submitted to the jury and they had retired to consider their verdict, one of the jurors, E. D. Thomas, took from his pocket a sheet of paper containing a lot of typewritten questions about the case and submitted them to the jury, or a part of them, for consideration, but affiant immediately told him that the same could not be considered, that they had the Court's charge to go by and that it would be improper to consider these matters. I know they were not the papers submitted to us by the Court." (Record, page 329).

Mr. H. A. Kypfer, another one of the jurors, likewise stated "that Mr. E. D. Thomas, one of the jurors, took from his pocket a sheet of paper containing some typewritten questions about the case and said, "I have this made up so as to assist us." This

juror also stated: "In regard to the testimony of Miss Hill concerning Dr. Dale's insulting treatment in his sanitarium at Texarkana, I can truthfully state that this fact influenced and prejudiced me in arriving at a verdict." (Record, page 328).

Immediately after said trial, E. D. Thomas wrote the attorneys of the petitioner a letter, in which he said: "That, we, the jurors, feel that any evidence developed during the trial should not reflect upon the good moral character and reputation of Dr. Dale. \* \* \* The writer does not know why the foreman made no effort to have the Court announce an agreed upon expression of confidence in the good character of your witness, Dr. Dale, and he writes this that you may take such steps as you deem proper to have announced or unimpaired confidence in the righteous character of this man." (Record, pps. 327-328). This aroused the suspicion of counsel who caused an inquiry to be made with the following result:

The said juror, H. H. Kypfer, in his affidavit, further stated, quoting from the letter of Mr. Thomas, that the evidence did not reflect upon Dr. Dale, in the following language: "I will further state that I did not approve of this expression but did oppose it and do not understand why Mr. Thomas still holds that we all agreed to this." (Record, page 329).

Mr. O. E. Lacy, the juror referred to in another affidavit concerning the Thomas letter, said: "Mr. Thomas was the author of this statement and fathered it but I was opposed to it at all times, saying it was not for the jury to decide such things and requested the foreman of the jury to destroy it, which I supposed he did." (Record, page 330).

Mr. Adolph Wilson, another juror testified concerning Miss Hill's testimony about Dr. Dale, as follows: "As I believed all she testified to, and had no reason not to, I believe she was in-

sulted by Dr. Dale in his sanitarium, and as Dr. Dale did not impress me to the contrary, Miss Hill's testimony regarding his treatment, influenced me in my verdict as much as any part of the evidence on record. (Record, page 331).

Oliver Rose, another juror, stated the same thing about E. D. Thomas producing "from his pocket a sheet of paper containing some typewritten questions about the case. He said, "I have this paper outlining the case so we won't be so long." He further stated in his affidavit: "In regard to Miss Hill's testimony about Dr. Dale insulting treatment toward her in the sanitarium, I will state that this fact prejudiced me and influenced me more in rendering my verdict than any other thing and I believe it would prejudice any other man." (Record, pps. 331-332).

James Crider, another juror, stated "Mr. E. D. Thomas took from his pocket a sheet of paper containing some typewritten questions about the case. He said, "I have some data outlining the case which will help us to work faster," and I think read part of it to the jury. In regards to Miss Hill's testimony concerning Dr. Dale's conduct in his sanitarium, I will state that this one fact prejudiced me and influenced me more in rendering my verdict than any one other thing." (Record, page 332).

We merely quote from these affidavits of jurors made themselves, to show that we were prejudiced in not having jurors who would not become a partisan or influenced by matter of the kind in question, and it is enough to show that such men as Vance and Lentz were needed on that jury. A remarkable condition of affairs if this case was tried before a fair and impartial jury. It is hard enough for railroads to get justice anyway, surely they ought to have the chance to select jurors of such high character and standing as Vance and Lentz, the community produces no better. These men were not disqualified and the

defendant was prejudiced by their being excused. Opposing counsel contended in the court below on account of letter of the stenographer (Rec. 79) and qualification (Rec. p. 86) of the bill—all the testimony was not copied, but what was meant the stenographer did not take down all the testimony of Vance, he did of Lentz. Still the effect of all the testimony of Vance was brought out in the cross and redirect examination sufficient to show what he did say.

Lentz said, p. 82, he was in Vance's position, but all of Vance's testimony is not taken down. Counsel must admit there was no difference in what was omitted from that taken.

## STATEMENT

## AUTHORITIES

## THIRD POINT OF LAW

(Assignment of Error No. 3, Rec., p. 362)

(Bill of Exception No. 3, Rec. p. 87).

It was error in the Court, as set out in the assignment not to have continued or postponed the case in order for defendants to have secured testimony to contradict Miss Hill and to show the high character and standing of Dr. Dale, for what it was worth to go to the jury. This may be considered in connection with Eleventh Assignment.

One of the defenses of the defendant and a material one, was that if this young lady had remained in Dr. Dale's sanitarium she would have gotten well. She said she was improving, for she said on her direct examination:

"Dr. Dale's medicine helped me and it was but a short while that I got so I could eat something; and at times I retained my food and at times I did not. After I had been in the sanitarium two weeks I became dissatisfied as I was among strangers and I had never been away from home before. I thought if I had to die I would rather be back at home with my people; but I was a whole lot better when I left the sanitarium but I had no more than arrived at home before I had another spell." (Record pps. 111-112). On Record page 126, she said: "I do not know that I told Dr. Dale about it, but he made a thorough examination and he treated me and he kept a chart of his examination and treatment. When I left Dr. Dale's hospital, I was improved some." See chart, Record, p. 320).

This was supported by Dr. Strong, Record, page 209, and Dr. Dale himself. (Record, page 321).

The plaintiff, so we infer, for the purpose either of prejudicing the jury or to explain why she did not remain at the sanitarium or return there, sought to draw out the fact that Dr. Dale had insulted the plaintiff by putting his arm around her. Whereupon the defendant requested the Court that the case be postponed until it could secure depositions of witnesses from Texarkana to establish his standing and character, meaning Dr. Dale. We asked time to prepare an application setting up the facts so that we could have an opportunity to have witnesses here to show the character of the man; to show that he would not be guilty of anything of that sort. The Court refused to postpone the case and said that he would give us time to prepare the motion and it could be considered in. (Record page 88). The motion as set out, is on Record, page 89, as a part of bill of Exception No. 3. The motion was prepared and filed on the 15th day of May, 1913, and the same day that the witness was testifying, which was called to the attention of the Court

and by order entered of record duly overruled. (See Record, p. 93).

Among other things, Miss Hill stated: "After the first examination he made of me, after I got able to walk out in the hall, I was sitting out in the hall in the afternoon; and he asked me if I would come to his room and I went and he caught me in his arms and loved me just like I was a baby; but I was a lady and in a few minutes a nurse came and made the second examination, and he remarked, he said, "you are as cold as a catfish," and if I had ever given him any cause for it I don't know what it was." (Rec., p. 94). See Bills of Exception No. 5, Rec., p. 105. Bill of Exception No. 11, Rec. p. 295.

#### REMARKS

This testimony, while it might have been admissible, as a reason why she did not remain with Dr. Dale's hospital and continue a treatment that was beneficial to her and under which she was improving, was still obviously introduced for the purpose of prejudicing the minds of the jury, as it did so, as we were not allowed time to secure the witnesses to contradict her, as we have shown hereinbefore from the statements of the jurors, which would have gone to the weight and credibility of her testimony. It should be remembered that this testimony was offered on the 15th day of May, (see Record, p. 93), and the case was submitted to the jury under the charge of the Court on the next day, the 16th of May. (Record, p. 44). The order overruling the motion was filed on the 15th day of May. (Record, p. 44). The Court did not adjourn until the 18th day of July, 1913, and it is too clear for argument or suggestion, that there was no need of hurrying this case through as the Court had plenty of time.

It is a little singular that the Court signed the qualification written by the attorneys, which is in the direct face of the Record of the Court. It will be remembered that when the questions were asked Dr. Hale, that we asked time "to prepare an applica-

tion setting up the facts, so that we can have an opportunity to have witnesses here to show the character of the man; to show that he is a man who would not be guilty of anything of that sort." When the first request was made, the Court seemed to be inclined to grant it and said: "What do you say, Mr. Carter?" Mr. Carter replied: "No evidence of that kind would be admissible if it was here." The Court then said: "I can't postpone the case any further." We then asked the Court: "You will give us time to prepare that motion?" The Court replied: "You may consider it in," and Mr. Carter said: "Yes, sir; consider it in; however, we did prepare this motion as shown and filed it in Court and called the attention of the Court thereto, and he overruled it as shown by the Record, which speaks for itself. (Record, p. 44).

Now here comes the qualification which counsel wrote and which the Court signed, in which he says that "the motion copied in the Bill was not read by the Court or to the Court and was not presented or read by counsel for plaintiff." How could His Honor undertake to say what other counsel did or did not do? The qualification continues: "When the Court ruled upon the motion to postpone, it was just after Dr. Dale had denied taking any improper liberties with the plaintiff." I do not understand why this sentence was put there, as we desired to put Dr. Dale's character in evidence before the jury on account of the adroit attack made upon him, which we regarded was to get it before the jury and we were helpless to meet the issue unless we could get witnesses from Texarkana. Unless we could not afford to do that as we were helpless to meet the issue unless we could get witnesses from Texarkana. Unless we could show she was making an unwarranted statement and not disposed to shut off the inquiry or to dodge it, would leave the imagination of the jury to "run mad." The qualification goes on farther and said: "The Court was not called upon to rule upon the question of postponement after the plaintiff had testified



in rebuttal." This is now a retrospect, "side-stepping" of the issue and tends to increase our confidence: In view of the fact that we had made the request, which was before the Court and the motion was there, it is a little remarkable to make this qualification, since in the first place it could not have been rebuttal testimony brought out by the plaintiff herself. This indeed seems to be a skillful qualification. The Court proceeds further and says in its qualification: "While it was agreed that counsel for the defendant would put in writing the motion that was orally made, it was not contemplated that the written motion should be in any wise different from the oral motion which had been overruled." We were not permitted to complete oral motion, which we would have dictated had we been given the opportunity, but pursued the only course left us, to thereafter put in writing, file and present on **the very day**. There was no attempt on our part to say what would be in our motion, for Judge Maxey, as will be seen, did not even allow us to finish the sentence. We should have proceeded and dictated the motion but for the impatience of the Court at the time, and we plead for time to prepare the motion, which was given us, but with an emphasis by the Court, who said, "You may just consider it in;" concurred in by counsel. (Record, p. 88). Consider what in? It could not be "in" until written out.

This motion remained on file with the order overruling it from the 15th day of July, included the judgment of the Court overruling it from the day that it was filed and up to and including the motion for new trial, in which this ground was specially set forth, elaborately, in paragraph XIII thereof, to which motion for a new trial was attached the names of the nurses, their affidavits and affidavits of other credible citizens of Texarkana, (see Bill of Exception No. 11, Rec., p. 295), which motion was filed on the 21st day of June, 1913, which would still have given an opportunity to try said cause during that term of the Court if new trial had been granted. Which motion



for a new trial was duly considered on the 8th day of July, 1913, and not one word during the whole of this proceeding was said or indicated that the Court, or the attorneys, were not familiar with the record in the case, which is for the first time raised by this qualification. We could not anticipate a denial of the contents of the motion in writing, openly filed and overruled by the Court, that a qualification would, months thereafter, be entered to deny the benefits of a privilege which was given. This we regard as most unjust and unexpected. The motion was called to the attention of the Court and the Court did act upon it, as the records in this case show.

The Court further qualified and said: "There was no objection to any of the testimony upon the subject mentioned in this bill and no motion to strike it out, and no definite period of postponement suggested." We do not know why the Court saw proper to make this statement, but in reply thereto, **we knew that the truth told to the jury would not be half so bad as leaving them to infer that Dr. Dale had been guilty of improper conduct.** If we had made our objection, we might possibly have been met with the customary tactics, "we withdraw the question if counsel is afraid of the answer," **which would have had three times, yea, one hundred times, more dangerous effect than to have made the issue squarely,** which we desired to do, notwithstanding the Court has suggested another way we did not care for.

We also in this connection, refer this Honorable Court to Bill of Exception No. 11, Record, p. 295, which was attached to it the affidavit of the nurses, contradicting the plaintiff, and the affidavits of other reputable persons as to his good name and character and the report of the nurses attached thereto, showing her condition while at the sanitarium, further contradicting her. She stayed a week or ten days after the alleged conduct of Dr. Dale. (Record, p. 98).

See the legal document signed by Thomas, the juror, to explain his peculiar conduct that does not explain but shows his purpose. Rec., p. 327.

## AUTHORITIES

See authorities cited under Eleventh Assignment.

### FOURTH POINT IN LAW

Assignment of Error No. 4, Pec., p. 363)

Bill of Exception No. 5, Rec., 105

Special Charge Requested, Rec., 54.

As the injuries, such as the plaintiff sue for, could not be, and were not, the direct and proximate result of the collision and shock, the Court should have given the charge requested. The error of the Court is preserved in refusing the charge in Bill of Exception No. 5, Record, p. 105.

The charge requested and refused is as follows:

"You are instructed that under the evidence you will find a verdict for the defendant, because such injuries as plaintiff sues for could not be and were not the direct and proximate cause of the collision and shock, if any, to plaintiff." (Record, p. 54).

### STATEMENT OF TESTIMONY

CLARA HILL, the plaintiff, testified she was unmarried and was born on August 17th, 1888. She was nearly twenty-five years of age when the case was tried. She was working for the firm of Melon Mercantile Company, at Melon, Texas, getting

Thirty Dollars (\$30.00) per month, with the promise of \$50.00 per month on January 1st, 1912. She bought transportation from the I. & G. N. Railway Company agent at Pearsall. (Record, p. 107). \* \* \* There was a great shock and she was thrown out of her seat and was knocked unconscious; was thrown forward against the lower part of the seat. She fell forward on her seat, underneath the chair in the aisle and against side of the seat. Several persons, probably three or four, fell on her. Her sister was also thrown, as was a number of people thrown out of the seat. (Rec., p. 108). \* \* \* Trainmen came through the cars and asked their names. \* \* \* She had only about fourteen miles further to go to get home and in the meantime began to get stiff. Her father met her at Atlanta and took her home and she went right to bed. She never felt any numbness until the next day and after the numbness left her, the pain came on and she suffered for a while before she was relieved. She felt sick at her stomach, could not retain food. The nausea first appeared when she got home but was not as bad as the next day. She had no appetite. She had a bruise on her back and two or three on her left side; there were two on her hips. Immediately after the wreck she sat up in the seat in the car. At that time she felt nervous and weak; had a kind of numb feeling; she did not realize at first she was hurt. \* \* \* When she arrived home she was a little worse. The symptoms of nausea began the morning after the collision and she kept vomiting off and on from that time until she was taken to Texarkana on the 15th day of January. (Rec., p. 109). \* \* \* She remained in bed all the balance of the day and had no doctor until next morning, when they called in Dr. Strawn, who prescribed for her and his medicine seemed to help her. (Rec., p. 110). \* \* \* She called in Dr. Roach. Dr. Strawn came and she was made easy and went to sleep. About 10 o'clock the next morning another spell came on her and still another at 2 o'clock that night, suffered as she did at first but not as much and the doctor gave her medicine and finally got her easy. She went to

the sanitarium at Texarkana on the 15th day of January. After the 22nd day of December until the 15th day of January she was in bed all the time but was up and down. She walked a little after she first got up and Dr. Strawn sent his buggy for her and she went to his house and spent the day. (Rec., p. 111). \* \* \* When she arrived at Texarkana she was taken in an ambulance to the sanitarium. She was there fourteen days. When she arrived at the sanitarium she was real sick, nauseated and vomited. Dr. Dale's medicine helped her and it was but a short while that she got so she could eat something and at times retained her food and at times she did not. (R., p. 11). \* \* \* But she was a whole lot better when she left the sanitarium and had not more than arrived at home when she had another spell. She left the sanitarium about the 1st of February. During February she was at her father's home and while there was up and down. Dr. Strawn treated her all the time. She started back to Pearsall on the 24th of March. She remained in San Antonio one night. It was about March 26th or 27th when she finally arrived in Pearsall. (R., p. 112). \* \* \* Before she came to San Antonio to be operated on, Dr. Williamson treated her in Pearsall. \* \* \* She was brought to San Antonio and examined by Dr. Berry, City Physician; Dr. Kingsley, also Dr. Stout. \* \* \* Dr. Kingsley and Dr. Williamson made a second examination. Before the accident she had no medical treatment to speak of. The only medicine she recalled was taking some tonic; she felt tired and fatigued and took electric bitters; she did not take a great deal of patent medicines as charged in defendant's answer. She only took two bottles of patent medicine she could remember, during her life. She got the patent medicine in a drug store where she was working. She had had the measles, whooping cough and chickenpox when a child, before the accident. \* \* \* Before she left Pearsall for Queen City she had a little boil on her leg. She went to see Dr. Hope about it. The boil was not lanced but was broken in a week. (Record, p. 113).

On cross-examination, ( \* \* \* ) She was out of the car at Kildare, just a little while, probably twenty or twenty-five minutes; she was not taken out of the car but walked. When she arrived at Atlanta, she was not taken out of the car on a stretcher but was assisted by her sister. She said she told the person who came through the car, she thought she was hurt and he said she was scared, and she said maybe she was. \* \* \* It must have been an hour or more after the wreck before she got out and looked at the engine. She went forward to get out of the coach but did not count the coaches up to the engine, there were several; did not know that there were seven cars and a tender before she got to the engine, something like four or five hundred feet. (Rec., p. 116).

On the 23rd the doctor came in the morning and she does not remember whether she vomited up to that time but had been sick at the stomach. She told him of the scar on her hip and he treated her. Rec., p. 118. \* \* \* Dr. Strawn began treating her on December 23rd, treated her up to the time she went to Texarkana on the 15th of January and remained at the sanitarium about fourteen days, which would be the 29th of January. **She improved some while there.** She did not come home practically well; **came home feeling a whole lot better.** She did not have the skin broken on her except the little boil on her leg. She said she was better now than when she came from Queen City to Pearsall and thinks the operation has helped her. Rec., p. 121. \* \* \* She only had the little boil described. She had been working in a big dry goods and grocery store. The boil came a few days before she left Pearsall; was bruised and sore probably almost a week or more. Rec., p. 123. \* \* \* There was a large bruise on her leg, way down, and a place on her back. The injuries she named as the most important and did not notice the bruises until she was removed to Texarkana and there was none other **except the ones indicated.** She got out of the car and walked a few hundred yards, (this was

immediately after the accident) the train stood upon an elevation and she had to step way down to get off the car. The car was probably as high as the table (indicating). Rec., p. 124). \* \* \* She got back in the car the same way she got down, her sister did not lift her back in the car. The injured hip must have been injured when she was thrown down in the aisle. "When Dr. Williamson examined me and suggested to me that I had a dislocated hip he also told me that I was hurt internally; and that all the medicines in the world would not help me except temporarily. He told me that a surgical operation would be necessary and I believed him, as he was a truthful doctor. \* \* \* "

She further stated: "The first time I went to Dr. Strawn's office he sent a horse and buggy for me and I went in that way. For a few days I walked to Dr. Strawn's office. \* \* \* I went to a few places at Queen City but not very far. I went to one place and stayed all night. After returned to Queen City from Dr. Dale's sanitarium. \* \* \* I would walk as far as Mr. L——, a little piece the other side of the drug store; I could not say just how far it was but it was a few hundred yards from the drug store and his house is a little distance the other side. After I returned to Pearsall I walked around when I felt like it because the doctor said it was the best thing I could do." She further stated that she walked up and down the streets of San Antonio at the last term of Court and walks better now than she did and she is not nervous and weak. Today she says she is nervous and weak. She did walk all around over the town of Pearsall but had fallen twice. Walks about the house at home; can get around any place she wants to go if not too far). (Record, pages 107 to 130).

DR. B. F. KINGSLEY testified that he found a general inflammation throughout the pelvic and lower abdominal tissues; the ovaries were enlarged and bound together by adhesive bands of adhesions as a result of the inflammatory condition. These adhesions were comparatively of recent origin. \* \* \* The

ovaries were removed and it was necessary to remove the entire appendages, both ovaries and the tubes on account of the condition they were in. It was necessary to remove the appendix also as it was involved in the inflammatory process and bound down by adhesive conditions. \* \* \* He examined plaintiff's back and found that the left hip was lifted probably three-quarters of an inch above the other and a shortening of the right leg something like three-fourths of an inch. The lower dorsal-vertebra is deflected to the right at least one-half or three-fourths of an inch and it is from that region that she has complained of soreness all this time. The conditions found in plaintiff could have been produced by an accident or trauma. "From my examination and assuming that plaintiff was a healthy woman before she had the accident in question, would attribute her present condition to the accident. My fee for the services which I performed in connection with the plaintiff was \$500.00, which is a reasonable charge in my opinion." Rec., p. 132.

Dr. Kingsley stated on cross-examination:

"A nervous person if kept in a state of nervous excitement would be aggravated and the settlement of that condition of nervous excitement would favor a recovery. It is a fact that the conditions which aggravated the patient's nervous condition would, when removed, assist in the person's recovery." (Record, page 138). He further stated: "Usually the incidents of change of life brought about by the removal of a woman's ovaries would be gone through in from two to five years." Record, p. 137. He further said: "It is largely true that nervous prostration of neurasthenia, developing from a railway accident associated with fright and demoralization of the patient is a favorable case for recovery, if the patient is placed under proper conditions and all causes of anxiety and worry are eliminated." Record, p. 137. He further stated: "I removed both of plaintiff's ovaries; her ovaries were enlarged by what is known as cystic degeneration.



The ovaries and tubes were very much swollen and enlarged. \* \* \* I made no examination whatever for germs. (I have stated all the examinations which I can think of which I made I made no sort of microscopic examination. \* \* \* By being 'thoroughly diseased,' I mean that plaintiff's ovaries were filled with little water cysts of watery tumors. The tube was not enlarged with cysts but was enlarged by the adhesions which for a long time had been alternating its functions. \* \* \* Her womb was slightly enlarged and retroflexed, and her left ovary was also displaced. The womb was pushed back and turned under to quite an extent." (Record, pages 140-141). \* \* \* If the places indicated were the only bruises that plaintiff received, I suppose it would be difficult to explain all of her inflammatory conditions in that way. It would be next to impossible to produce injury severe enough to be shown by the pelvic bone." Record, page 142). \* \* \* In other words, the surgeon's knife is the ultimate outcome of a displaced ovary. \* \* \* (I did not treat the plaintiff; I gave her one prescription and she went away and stayed over a month and then came back and went home to meditate as to whether she would undergo an operation." (Record, page 144). "Operations for appendicitis are very usual." Record, page 144). "I do not think it would have been better to have sent this young lady to the hospital and continue treatment given her, as I know it would not have helped her; and especially when I know that such relief was only temporary and by delay the patient's life is jeopardized.") (Record, p. 145).

MISS MAMIE HILL, sister of the plaintiff, stated, speaking about the wreck: "A little while later I went out of the coach to see the wrecked engines and came back and told my sister about it and she wanted to go out also, but I protested. She insisted, however, and in an hour or so after the wreck, she went out and looked at the engine. \* \* \* Mother and I went to Texarkana after my sister, the plaintiff, and Dr. Dale told us



she could not leave, but she was dissatisfied because she was among strangers and he finally consented for her to go home and stay awhile, and then come back again." (Record, p. 150).

\* \* \* When I picked my sister up she was lying with her stomach down. I do not know if that is the way she fell but that is the position in which I found her." (Record, p. 152).

MRS. GEORGIA HILL, mother of the plaintiff, stated: "We took her to Dr. Dale and he said it was just a nervous breakdown of some sort. I could not say exactly how long the plaintiff was at Queen City, but it was from the 22nd or 23rd of December up until along in March some time, when she came to San Antonio. She seemed better and we asked Dr. Strawn if he did not think it would help her to come to San Antonio, and he said he thought it would. We asked Dr. Strawn if he thought she could stand the trip and he kept doctoring her along and she **seemed to be better right then than she ever had been.**" (Record, p. 157. Dr. Strawn is our family physician; he is regarded as one of the leading physicians there; he is a fine doctor I think and a fine man in every way." (Record, p. 158). She further stated: "I did not go with the plaintiff to Dr. Dale's sanitarium but I went to Texarkana with my daughter Mamie when the plaintiff was seeking to come back to Queen City. I did not want to go because I knew when I arrived there the plaintiff would want to go home and I wanted her to stay as long as she could. I talked to Dr. Dale and he told us she wanted to go home and that he thought it was best to **take her home and then let her go back again.** He advised that because the plaintiff was nervous and because she wanted to go and her mind was on going home." (Record, p. 160). \* \* \* She improved enough for her to leave and come to San Antonio. \* \* \* Dr. Strawn asked me if the plaintiff did not have female trouble and I did not suggest it to him at all." (Record, p. 161).

DR. JOHN O. KEMP, witness for plaintiff, the gentleman

who assisted Dr. Kingsley in performing the operation, stated: "I do not know whether, if the blow plaintiff sustained at the time of the accident was sufficient to cause the injury to her ovaries, she could have gotten down out of the chair car and walked around. It requires a pretty severe blow to injure a woman's ovaries." (Record, p. 167). He further stated: "Where a woman has suggested to her, that she has female or other trouble, to relieve them she takes any suggestion or undergoes any operation, thinking she would be relieved; that is called neurasthenia. It is well established that neurasthenia may occur in such cases. I could not say whether the plaintiff was suffering with neurasthenia as I had never seen her before on the operating table, and I will not say that neurasthenia was her trouble. If a patient is in a sanitarium undergoing treatment by a reputable physician and she improves under that treatment I would suggest that she remain there and go on with the treatment." (Record, p. 168). "The doctor has to treat the patient's mind as well as her body; and when the patient is relieved in that way she gets well of neurasthenia. If there is any way that a treatment can be given so as to save the ovary and not unsex the patient, that should be done." (Record, p. 168).

JAMES SULLIVAN, witness for defendant, testified he was on the train. Rec., p. 176. \* \* \* "When the train struck I had but dozed off asleep. There was a sudden shock and I just raised up. (Rec., p. 177). \* \* \* My children were not thrown off their seat. \* \* \* We remained at the scene of the wreck about three and one-half hours. \* \* \* There was a sudden stop; it did not throw me out of my seat at all. \* \* \* Quite a crowd went out to look at the wrecked engine; I did not notice any cripples out there nor any one being helped around." (Record, p. 177).

MRS. SULLIVAN likewise testified she was on the train, and stated: "I was riding in the chair car. \* \* \* I reckon we

stayed at the scene of the wreck two or three hours; I did not see anybody thrown out of their seat at the time of the collision. \* \* \* I was in the seat just behind my husband. The children were not thrown out of their seats by the collision but remained where they were." (Record, pp. 179-180). \* \* \*

BERT COX, conductor, testified: "I went around and saw all the passengers as soon as I could get to them. \* \* \* I went through the chair car and took statements of every passenger with the assistance of Mr. Johnson. \* \* \* We took down the name of Miss Clara Hill. The question was asked if she was hurt and she replied no. She was sitting in her seat and did not appear to be hurt. Mr. Johnson was with me when we took her name." (Record, pp. 185-186). \* \* \* He further said: "It is not hard for me to remember what each passenger told me as I put it down on paper. I put on the paper just what the plaintiff told me and her name and address. I was supposed to give names and addresses of all the passengers." (Record, p. 187).

MISS ETHEL JOHNSON, witness for the defendants, testified: "I did not get hurt in the least. \* \* \* About half an hour after the collision I went out and looked at the locomotive. When I got off the car there was an embankment there, a low place, and we had to be helped down as we could not step from the car right down to the ground and there was no stool to step on." (Record, p. 189).

MISS SYDNEY JOHNSON, witness for defendant, testified: \* \* \* "I do not remember anybody being hurt and I do not remember anybody being thrown from the seat or over the seats and no one was thrown in the aisle that I knew of." (Record, p. 193). "Mr. Cox, the conductor, and the porter and my father came through the car and the porter took our names. \* \* \* None of the passengers were seriously hurt but a few that I remember were scratched from broken glass." (Record, p. 194).

MARTIN WARREN, witness for the defendant, testified: "When the wreck occurred it did not have any effect on me except to throw me forward a little; did not hurt me at all. I did not see anyone around me that got hurt. I did not do anything but stand up and look around. I could see all over the car. I did not see any one in the aisle. No one was down in the aisle that I know of." (Record, p. 195).

MR. ED. SILVERS, who lives in Quincy, Illinois, was a passenger on the train, testified: "I was leaning back a little and the jar was such to bring me forward as I have indicated. It did not hurt and I went on the same car to Texarkana. Some one came through the train, took my name and address." (Record, p. 197).

A. S. JOHNSON testified: " \* \* \* It did not hurt me a particle. \* \* \* After the excitement was all over, Mr. Cox, the conductor, came to me and asked me to go to the mail car and get a long piece of paper and go through the train and take the name of every passenger and ask them the question, 'Are you hurt?' And those that had scratches, or needed a doctor to report them." (Record, p. 199). "If a passenger was scratched or cut I put that down. Mr. Cox kept that report and sent it to his superintendent, I suppose, with his trip report." (Record, p. 200). "I certainly did ask Miss Clara Hill while I was writing down her name, if she was hurt. \* \* \* Miss Hill's reply to my question was that she was not hurt." (Record, p. 201). "By referring to the paper handed to me, I see her answer is 'No,' both she and her sister answered no. The paper handed me is in writing and that is the plaintiff's correct answer." (Record, p. 203).

DR. R. L. LONG testified: " \* \* \* I did not hear anything about anybody having a dislocated hip nor did I know of anybody having a broken hip, a broken back or trouble with their

back. No one in the chair car made such a complaint to me. I went through the chair car." (Record, p. 207). "I was asked to go to the wreck by the company. I was not local surgeon for the railroad company at any time but answered the call for doctors to come down by wire from Kildare, I think." (Record, p. 206).

DR. J. C. STRAWN testified: "I am their family physician. The first time I was called in their family was to see Miss Clara Hill, plaintiff: \* \* I was called down to see Miss Hill on the 24th day of December, a couple of days after the wreck. \* \* \* I do not know that I was told what her complaint was. (Rec., p. 209). \* \* \* The plaintiff was more or less nervous when I made my first visit and on my next visit I found her nervous, and I was told about a little ulcer on her thigh. \* \* \* I dressed the thigh when I went back that evening or night about 9 or 10 o'clock. \* \* \* Plaintiff was sick at her stomach. \* \* \* I attributed the sick stomach to the nervousness. The ulcer was an open ulcer. It was not very deep but was discharging more or less pus and I cleaned that out thoroughly and she did better until the 31st of December and I did not see her from the 31st until the 7th of January, and from the 7th until the 15th I saw her every day and some times twice a day. During that time she vomited considerably. (Rec., p. 209). \* \* \* She was up from the 1st of January until the 7th, and I suggested that they take her to the hospital. I discovered that her family were very nervous from the fact that they came for me and sent for me and would be very excited and would meet me half way and wanted me to come on; and I called their attention to their actions, and held down all the excitement I could. I did not give her very much medicine but tried to keep her as quiet as possible. Dr. Roch was called on the evening of the 24th during my absence and when I came I talked the matter over with him and we thought her trouble was caused from the septic trouble from this ulcer; but the nervousness continued after the

ulcer was healed, and was practically well when she went to Texarkana. My diagnosis with reference to her nervousness was a neurasthenic condition and I concluded that was her trouble. I think the plaintiff complained from soreness in her back before she went to Texarkana and I examined the back and could not find any acute trouble at any given spot; but it was just soreness and I prescribed a liniment for her two or three times possibly. I examined the plaintiff's spine but I found no trouble with it and she had complained of soreness and I made an examination to see if there was any particular spot or anything to cause the trouble. She made no complaint of soreness and I made an examination to see if there was any particular spot or anything to cause the trouble. She made no complaint of soreness at any other point, but her stomach was the proposition that was giving me the most trouble. Neurasthenia caused the trouble I found with her stomach. I finally concluded that the cause of her trouble was her nervous system, and her stomach and digestion. As well as I remember she was constipated when I first saw her and some days after she would do better and possibly the next day she would not do so well and would be unable to retain her nourishment. She was taken to the hospital on the 15th of January. I treated the plaintiff from December 24th until December 31st and then did not see her until January 7th; and from January 7th until January 15th I saw her every day; on the 15th I carried her to Dr. Dale's sanitarium. I made a close study of her case and troubles and did the best I could to relieve her of this nervous condition. I have found that if a patient suffering in that way can be taken to a hospital away from the influence of their family, they will do better, as sympathy is not what one needs in such a case of nervous trouble. I carried the plaintiff to Texarkana for that was the most convenient point to take her, and I knew that Dr. Dale had a good sanitarium and that she would be well cared for, and I thought it was the best thing to do for her. Dr. Dale is a very successful surgeon and

practitioner, and I usually carry my patients to him for operations. I know that Dr. Dale is regarded very high by the profession. I gave him the result of my diagnosis, and he took charge of her, and I was up to see her only once after that before she was taken home, at which time she was up, in the parlor, and doing nicely, I thought. \* \* \* I talked to her people about her remaining in Texarkana, and I wanted her to stay as she was getting along so well; but she was so anxious to return home that I thought her worrying over it would cause her as much trouble as any good she might accomplish by staying. After she returned to Queen City she did not want to go back to Texarkana. **The reason she wanted to leave Texarkana was because she wanted to come back home and spend a while.** I mean by 'home,' her home in Pearsall. (Rec., pp. 211-212.) \* \* \* But my real reason in advising her to come was as I have stated. The plaintiff was able to come to Pearsall at the time alone. The plaintiff was able to walk some, but how much I could not say. I saw her up town some. **At that time I could not see anything in her walk that indicated any trouble.** Upon her return from Texarkana she told me that she could not wear her corset; that it gave her pain. **That was a subjective symptom.** What she said to me about it was all, and she also complained of pain in her left side. She said the pain was in her hip and I examined her and found the pain was in the lower part of the abdomen. I did not find anything wrong with her hip that I remember of. I had a talk with Mrs. Hill relative to examining her daughter, the plaintiff, for female troubles. I heard Mrs. Hill's testimony relative to that matter and I dislike to make the statement, but she has forgotten the conversation. One afternoon between the 25th and 30th of December, Mrs. Hill told me that the plaintiff had some female trouble, and as soon as she, the plaintiff, could get straightened out, that she, Mrs. Hill, wanted me to look after the plaintiff. I told Mrs. Hill "Very well," but I never got to examine



her but I called Dr. Dale's attention to the matter when I took the plaintiff to Texarkana. I did not make an examination because I did not think plaintiff had recovered sufficiently to make an examination of that kind, and there was nothing there to warrant an immediate examination. That was my opinion when I treated her. I looked after the plaintiff very closely when I was not very busy, and I would go in to see her probably two or three times a day. The plaintiff did not mention any medicines she had taken or any treatment she had received, but Mrs. Hill told me the plaintiff never had a doctor to treat her. She also said the plaintiff had taken some patent medicine, but she never said what kind it was and I never asked her." (Record, pp. 213-214).

DR STRAWN stated on cross-examination:

"The place on plaintiff's thigh was not just a boil; it may have started out as a boil, but it was just an open sore. It was about half an inch in diameter and wasn't as large as a dime. Her nervousness continued after the boil healed. The boil was located on the upper portion of her thigh at the place I have indicated. After her nervous condition continued after the healing of the boil I did not attribute her nervousness to the boil altogether, though, of course, it aggravated her condition as it was inflamed when I saw it and was very sensitive. It makes no difference how simple those things are they will aggravate such cases. A neurasthenic is a person who is suffering from nervous prostration. \* \* \* A great shock may produce neurasthenia. (Rec., p. 216). \* \* \* "I am positive that the plaintiff's mother told me that the plaintiff was suffering from female troubles. That was some time between the 25th of December and the first of January. She did not say how serious the trouble was and never went into details, and I never discussed the case, but called Dr. Dale's attention to the matter when we carried her to Texarkana. I never discovered any evidence of female trouble



in plaintiff. The plaintiff's mother spoke of the plaintiff's trouble as being a chronic trouble; and said that the plaintiff was timid and for that reason she had called my attention to the matter. (Rec., p. 217). \* \* \* The plaintiff had no trouble in that region and no tenderness over the lower part of the abdomen until later on. At first she did not complain of any trouble in that region, but after she returned from Texarkana she did. Her hip was also perfectly normal at that time, and I made an examination of her spine and discovered nothing abnormal about the spine or hip. I examined her from up between the shoulders all the way down and there was no abnormal condition of the bones and no particular spot where there was any trouble. If the plaintiff's hip is now deformed and her spine is curved, I think it has developed since she was first hurt, and I do not think it existed at the time I examined her." (See Rec., pp. 217-218).

Upon direct examination, Dr. Strawn testified:

"The practice of removing a woman's ovaries is condemned, unless there is some malignant growth because of which it is impossible to save the tissues. \* \* \* I spoke to Dr. Dale about having been informed that the plaintiff had female trouble. I thought if there was any trouble he could look after it while she was up there." (Rec., p. 219).

DR. JOHN R. DALE, witness for defendant, testified:

"I live in Texarkana, Arkansas. I have lived there about 12 years. My occupation is that of a physician and surgeon. I have practiced my profession for 40 years. I am a graduate of Jefferson Medical College of Philadelphia. I have a hospital in Texarkana, and have had same for about 11 years. The capacity of my hospital is 36 patients. My practice is along the lines of general surgery. I have had a good deal more experience in

surgery than the average practitioner. In fact, for the last few years my practice has been limited to surgery. I have had a good deal of experience with reference to surgical diseases of women. My operations run from 300 to 400 a year, and about 25 per cent of those pertain exclusively to women. That per cent is just an approximation. My results from operations on women are satisfactory. \* \* \* I remember the plaintiff, Miss Clara Hill. She was brought to my hospital on the 15th of January, 1912." (Record, p. 221). "I visited her first in company with Dr. Strawn, who brought her to my place. I found her nervous, enemic and a sick girl, poorly fed, poorly nourished, complaining of a sick stomach and tremors and so on. \* \* \* The plaintiff was also complaining of bruised places on her body, and I examined her for bruises or scars and found none. That was something like a little over three weeks after the wreck had occurred that I saw her first. Dr. Strawn told me about the plaintiff's female troubles and asked me to determine about it. He said the matter had been mentioned to him and he asked me to see if there was anything wrong with her in that respect. I keep a chart of the condition of all patients in my hospital. Such charts are kept by the nurses daily. \* \* \* During the plaintiff's stay in the hospital her chart shows no elevation above the normal except maybe on one day when there was one and a fifth degree or some such small matter. \* \* \* In the absence of any organic lesions I would call the plaintiff's condition a neurasthenic condition." (Record, p. 222). "Some female troubles are apparent to the ordinary observer; but to determine most cases of female troubles the patient has to be placed on a hard flat surface like a table and put in a certain position for the examination. I had the plaintiff brought up to my office by a nurse and I made the examination of her on my examining table. Such an examination could not be made on a bed unless the trouble was very apparent to anyone. Some forms of female trouble can be found by the patient for ovarian troubles with her standing up. Because I can make a better examination on a

hard table or surface. I never examine a patient for such troubles on a hard bed, as such examination is not reliable, because you have to use a surface whereby the hips will not sink down and deceive you in the examination. I made a satisfactory examination of the plaintiff by putting her in the position I have indicated, and with one finger in the vagina and the other on the outside, and I found that the tenderness she complained of was superficial and not in the ovary. The examination which I made is the test necessary to determine whether the trouble was in the ovary. The patient knows, in such examination, what part of the body I am approaching; but the patient does not know that I am examining to find those particular things. When I made the examination of the plaintiff I found nothing abnormal about the womb or ovaries. I do not think I am mistaken about what I found. I also examined the plaintiff's pelvic viscera. As a result of my examination I found no disease or injury to the appendix or to any organ situated in the pelvis, nor to the womb. In fact the plaintiff told me she had never had any trouble and remarked that after the examination. (Record, p. 223). I did not examine the plaintiff until several days after her arrival at the hospital. She was in my hospital two weeks in all, and I think I made the examination during the second week of her stay. It is my rule to limit company in all cases, especially where I suspect nervous conditions. After my examination of the plaintiff my opinion of her condition was a neurasthenic condition with an element of hysteria. The neurasthenic condition I discovered in plaintiff was the tired, weak condition of the nervous system; and the hysteria was the pains, aches and increased sensibility. I found a tenderness along the spine, and I account for that through her nervous system, and would be a part which would come under the head of hysteria. In putting my finger up along in the vagina and exerting pressure at one point I got a sensation of pain. I moved the plaintiff's uterus about and there was no adhesions there. I did not say the pain I found was in the ovaries, but was in the nerves overlying the parts.

Thirty-five or forty years ago old Dr. Sims was the father of this branch of surgery, and he never undertook to explain the pain at the point I had indicated, but called it the "hysteria joint" because whatever the trouble was, the pain was most usually in the left side, low down. I did not examine the plaintiff and find an inability to stand with the eyes closed; that was simply locomoter ataxia, and I would expect that in her case. I did not find the tenderness at the point where nine-tenths of such nervous cases complain of having it; and I found that tenderness over a certain spot in the spine as well as in the groin. When I saw the plaintiff I found no such condition as described by Dr. Kingsley, that is, that 'her condition was so critical that it was impossible to get her on her feet to make certain tests.' She got up on the second day and walked about and wrote letters, etc. (Rec., p. 224). I do not know of any special thing which would prevent her from standing, as there are many things that might prevent her from standing erect. The extent of the lesion there would control as to whether she could stand on her feet or not; in other words, whether plaintiff could stand on her feet would depend upon the extent of the lesion at the point I have indicated. If the accident had had anything to do with that inability to stand, it certainly would have shown within the first three to ten days after the accident. I examined the plaintiff in about a month after the accident. The plaintiff complained of tenderness along the spine and particularly at one spot. I examined her for that pain and also the pain in the groin or side. Fright or shock will produce the pain that she complained of; and it had nothing to do with female troubles. Shock fright or anything of that kind, which are non-inflammatory and incapable of producing organic lesion, will produce that pain. I found nothing in examining her spine which would cause the pain, and I only went by what she said about the pain. I had the plaintiff walk. I think I would have discovered it if plaintiff had any trouble with her spine at that time. If any injury had been done to the plaintiff's spine at the time of the accident it would have ap-

peared at that time. A certain per cent of curvature naturally exists with women. I have a great many women, who come to me for examinaion for other reasons in whom I find this slight diversion. It can be congenital or acquired—either born that way or comes as a result of habit or disease. It can be cured by braces, plaster-of-paris suits, etc. I examined the plaintiff's hip or thigh, as that was one of the points complained of. I found a scar at the spot Dr. Strawn spoke of, where there seemed to have been a boil or an abscess. I do not know that the plaintiff complained of having a dislocated hip, but I would have known it if she had; as she could not have walked if she had had a dislocated or fractured hip. (Record, pp. 225-226). At that time the plaintiff was able to walk. I could not now attribute her condition in regard to her hip, as described by Dr. Kingsley, to the accident; because if the accident caused it, it would have been of sufficient gravity to disable her completely. In order to have the condition that Dr. Kingsley described, that would have resulted from injury received in the wreck, she would have had immediate disability, that is, she could not have gotten up and walked about. One may have a severe injury and not know it; but plaintiff could not have received such an injury as would have created inflammation in the ovaries and change the position of her womb without knowing it at the time, because the ovaries are so well protected, and to approach them there would have to be a fractured bone. In my opinion, before the plaintiff could have received the injury she claims, she would have had to receive a penetrating blow from the front. I found no such blow was given in my examination, and I saw no bruises or scars. There was tenderness in the spine and in the left side, but none in the pelvic bone. Plaintiff could not have received such a blow as to cause her condition without a destruction of the soft spots in such a way as would have been discovered; and I made no such discovery. In my examination I found no inflammatory action and saw no results of inflammation. I found no such condition as described by Dr. Kingsley, that is that her ovaries were enlarged

and bound together by adhesive bands or adhesions as a result of inflammatory condition, and adhesions in all the pelvic organs about the womb. My examination was such that I would have discovered those conditions had they been present. There are various ways in which those conditions could have been caused; and there are various causes which will produce them; but they would not have been attributable to the accident because they did not exist at the time I examined her. If the plaintiff's ovaries were enlarged and bound together by adhesive bands or adhesions as a result of an inflammatory condition, the proper thing to have done would be to put the organs into position and use agents to reduce the inflammation and adhesions as far as possible by local means, such as hot water douches, glycerine tampons, etc., before resorting to surgical means. Those treatments failing, it would then be proper to open the abdomen and act discreetly after getting inside. In case I had opened the abdomen I would have broken up the adhesions. By breaking them up I mean separating them. That is done frequently and satisfactory results obtained. I would also have put the organs in proper place, after which the circulation would have been re-established, and they would regain their normal position. A surgical operation would not be necessary to put the womb in place if adhesions existed. I would not have taken the womb out. I could move the uterus or womb about when I examined the plaintiff and I did so. That would indicate a mobility of the uterus. Cysts on the ovaries is a normal condition for the ovaries to present. Cysts are present on a woman's ovaries during menstrual life; after the change of life, her ovaries atrophy and shrink up and do not have cysts. Cysts are evidence of menstrual life. They are an indication of health and would not impair her health. (Record, p. 277). The proper treatment of the ovaries in the condition described by Dr. Kingsley would be to remove the Cysts. That could be done simply by taking them away, by opening the cysts and draining out the fluid. One would have to open the abdomen to reach the cysts; but it would not be necessary to remove the ovaries in the case



described. I would have attempted to save the plaintiff's ovaries if they were in the condition described by Dr. Kingsley; or at least one or a part of one. I found no such condition as described by Dr. Kingsley when I examined plaintiff. If the conditions described by Dr. Kingsley were not present when I examined the plaintiff, it is my opinion they could not have been caused by the injury which she claims to have occurred in December previous. My opinion is based upon my experience. In my opinion the plaintiff's condition when I examined her and when Dr. Kingsley examined her, was attributable to hysterical neurasthenia unquestionably because of these localized spots of tenderness or pain. The plaintiff said she felt well enough to go home, and I told her that she had better remain longer until she got stronger, but she insisted she was well enough to go home. I do not know of my personal knowledge that anyone came after her, but I understand her mother did come for her, and I am sure some one did. The plaintiff was improving under my treatment. Had the plaintiff remained in the hospital I would have expected a complete recovery. Such cases have to be kept away from sympathizing friends and kinfolks, as their presence will keep the patient's mind centered on herself. It is a kind of introspection, and the patient thinks about himself too much. I had a complete history of plaintiff's case when she was in the hospital. The condition of diseased womb, ovaries, appendix and fallopian tubes, as described by Dr. Kingsley, are not usual and ordinary in a young woman or virgin, for three reasons. (Record, p. 228). The first of these I will eliminate, because from my examination I know the plaintiff has never known a man. The next cause would be a direct puncture or blow or something of that sort. I do not think anything like an infection could exist in plaintiff from a blow. From the fact that the plaintiff was such a woman, free from suspicion, there could be no infection, and there could have been no injury to her womb unless it came from a penetrating blow. From my examination of the plaintiff there was nothing to indicate that she had received such a blow. If she had received

such a blow she would have discovered it, in my opinion, just as soon as the shock or concussion had passed. She would not have been able to get off the train immediately after the collision and step up a high step with the assistance of her sister, if she had sustained such an injury, but it would have been impossible if such a blow occurred." (Record, p. 229).

DR. DALE stated upon cross-examination:

"I found the plaintiff suffering with no female troubles. In other words, if she had any female troubles she did not have them when I examined her. She was a perfectly healthy girl in those parts as far as I could see. \* \* \* I am not willing to swear that Dr. Kingsley is guilty of malpractice as charged; but I say that I would not have removed plaintiff's ovaries under such conditions. I did not see plaintiff's ovaries, but I know their condition from Dr. Kingsley's description. The statement he made that they were so diseased they had to come out was his opinion. He did not have to remove them for such a lesion. I have taken out a woman's ovaries quite often, but it is not such a common practice as it used to be years ago. I could not say how many times I have taken women's ovaries out. (Record, pages 231-232). I have taken both ovaries from a woman. I differ with Dr. Kingsley as to the cause of removal of the plaintiff's ovaries. He said they were so diseased they had to come out, but he described the condition there, and I would not have removed them for that cause. \* \* \* I know what traumatism the plaintiff had from what I discovered afterwards from personal examination of the case. I know how much traumatism she received because there was no evidence of any. I made my first examination of plaintiff's case on the first day she came and every two or three days, going over the case. (Record, p. 232). \* \* \* Traumatism can produce inflammation, and inflammation necessarily produces adhesions; and I know that adhesions can involve the appendix, and that adhesions can involve the ovaries and all



the female organs. It is true that inflammation could produce the same trouble that Dr. Kingsley found in this case; but **concussion or shock will not do it. It must be a direct traumatism and penetrate the abdominal wall.** Traumatism can be so severe as to dislocate the organs; and you would necessarily have to change the relation of the organs before you would have inflammation, I would look for a dislocation of the organs in a case where there was inflammation. You can bruise the abdominal wall and set up peritonetal inflammation, and peritonitis would result. That would not take some time, but I would expect it within a few days after the accident. I did find soreness in plaintiff, but that was from her nervous condition. I can feel soreness and tell whether it is produced by a nervous condition or by traumatism from the various elements entering into it. I mean by neurasthenia a high nervous condition. It may come from various causes. I have heard of nerasthenia coming from railroad wrecks, and traumatic nerasthenia is quite frequent, but not so common as traumatic hysteria. Plaintiff had neurasthenia with an element of hysteria. I take it from the history of plaintiff's case that she was a well woman up to the time of the accident, and I found nothing in my examination to the contrary. Fright will cause hysteria and neurasthenia. The only thing that the wreck had to do with the plaintiff's condition in my mind would be to be contributory. There are two reasons why we die—predisposition and an exciting cause. I believe a man may have a predisposition to have tuberculosis, but he may not die unless some exciting cause comes along. The plaintiff was predisposed to nervousness and the exciting cause developed that predisposition. It is true that the railroad wreck might develop death. Therefore the railroad wreck co-operated with Nature in putting this plaintiff in the condition I found her. I think that the fright was sufficient to produce the condition I found plaintiff in; and after she became in that condition, she was impressionable, and became a prey to everything that comes along. I know that the Lord is responsible for the plaintiff being impressionable and not

the railroad wreck. Fright and terror, in the absence of traumatism is capable of producing the condition I found in the plaintiff; and when fright is coupled with injury it is more than apt to produce that condition; and when you have an organic lesion you eliminate the neurasthenia. In regard to the question of whether a person who is in a neurasthenia condition is more likely to be attacked by almost any kind of ill, you have to follow certain lines of predisposition, such as tuberculosis, or a high-strung system, various things along that line; and fright adds to a majority of those things. For instance a very nervous man who is caught in a wreck and sees an approaching engine is hurt worse than another man would be that was not as nervous. The plaintiff's back and hip were all right. Supposing that the plaintiff's back and hip are all wrong now, I could not connect her condition with the accident as detailed to me. If plaintiff was all right in these respects when I examined her I do not think that a shock or traumatism developed the conditions as they now exist; and I think I am telling the truth about the matter. I do not think I am mistaken in saying that the results of the accident could not have produced her condition. I said in the beginning that her condition could have been congenital. Congenital means to be born with anything. I did not find the plaintiff's back or spine curved, therefore that was not congenital, and it had not been brought about by habit. If those conditions do exist now as they were acquired. A person can acquire a curved spine in three or four months. I do not think the plaintiff is malingering in regard to her hip, but I do not recognize that condition of the hip existing at the time of my diagnosis. If it is conceded that it does exist now, then it has been acquired. The plaintiff has acquired her hip trouble if it exists today. I do not say the plaintiff is trying to make the jury think the hip is hurt when it is not." (Record, pages 233-234 and 235).

DR. DALE stated upon re-direct examination:

"Basing my answer upon the description of plaintiff's injury

as specifically given by Dr. Kingsley, that, is that there was little minute cysts scattered around, that her womb was slightly enlarged and retroflexed, and her left ovary displaced, I would say that was not such a condition as would require the unsexing of the plaintiff. I have found the cystic ovaries where they appeared like little bunches of grapes along the tubes. I was not conferred with by Dr. Kingsley at any time in regard to the plaintiff's case, nor was I asked for my opinion or anything about it. They knew she had been in my hospital and that she had improved there. I keep a chart for the information and benefit of the patients who come to my hospital, and I would have furnished any information requested by the doctors. They have never sought my opinion in any way, and have never communicated with me in any way. In every case my diagnosis is kept at my hospital. My opinion of her case is just as open to plaintiff's counsel as to the defendant's counsel, and am willing for them to see it now. Traumatism is a severe injury or blow. I meant by "penetrating" blow one that would go through the first structure, and I did not mean to go into the flesh and blood. The plaintiff's condition could have been caused by a direct blow, but if such blow was heavy enough to cause her trouble she certainly would have known it at the time." (Rec., p. 236).

THOMAS DORBANDT, witness for the defendant, testified: "I reside in San Antonio, and have resided here about five years. I am a physician and make a specialty of diseases of the nervous system. I have had experience in the examination of women for female troubles. I did general practice for about ten years, and have been confining my work to diseases of the nervous system for about the same length of time." (Record, pp. 237-238). \* \* \* The fact alone of the appearance of crysts on the ovaries of the plaintiff as described by Dr. Kingsley, does not indicate diseased ovaries, and such cysts belong there normally. The cysts have to do with the menstruation period that comes each month, and are a part of them. (Rec., p. 238). \* \* \* Where it is possible to

do so the part of the ovary which is diseased is removed and a part left. Enlargement or the appearance of cysts would not require the removal of the ovaries. The causes which I recall now that call for the complete removal of the ovaries, would be a cancerous condition of the ovaries, or a tubercular condition of an abscess, where there would be little cells or pockets of pus penetrating through the surface of the ovaries. None of these conditions would exist unless they were caused by infection. (Rec., p. 238). \* \* \* In order for traumatism or a blow to produce the condition found in the plaintiff, such a blow would have to be severe enough to bruise or mash the parts and destroy the circulation to rather an extensive degree, and would have to be of sufficient intensity to lacerate. (Rec., p. 239). \* \* \* She could not have walked at the time if the blow had been such as to have caused the injuries found on plaintiff, as the pain would have been very severe." (Record, pp. 238-239). "A blow would have to be very severe to jerk the ovaries out of place. If the womb was retroflexed it could be put in position by manipulation. An operation would not have been necessary to replace the womb if it were healthy. The adhesion found in plaintiff could be removed by separating the tissues that were adhered and breaking them apart with the fingers. That operation would not necessarily have required the removal of the ovaries. Such an operation is the only way to treat the adhesions; but the inflamed condition of the ovaries could have been treated otherwise than by an operation, such as by the use of tampons, douches and things of that kind. If an unusually large number of cysts were found on the ovaries, or if they were of unusual size, the proper treatment would be to pick them with a little lancet and replace the organs in the normal position. Until such course had been tried and has failed, an operation should not be resorted to, as there are other remedies besides taking out the ovaries which are frequently satisfactory. If the plaintiff had walked around immediately after the collision and had gone home to Queen City and was under treatment there and then went to the hospital at Texarkana and

walked around there and improved under her treatment, and then came back to Queen City and went from Queen City to San Antonio, and from San Antonio to Pearsall and walked around there, it does not seem to me that such a case would indicate the necessity of an operation such as was performed on plaintiff. If the plaintiff was able to do what has been detailed in the previous question, my treatment and the treatment of a modern physician would have been confinement to bed largely, and a medical treatment such as I have mentioned, with tampons, douches, and local applications and replacing of the uterus, and giving the patient the rest necessary to return to normal condition. From the testimony as I have heard it in this case I would pronounce the condition of the plaintiff to be hysteria. Hysteria is a condition of the nervous system in counter-distinction to organic disease. An organic disease is something that can be seen, or something that can be discerned by an external examination of the parts, as a consolidation of the lungs. A hysterical condition is where you cannot put your finger on the point of organ where the disease is located. It might be located at one point at one time and at another point at another time, and it is something over which the patient does not seem to be able to exercise any will power or judgment. If the conditions complained of by the patient actually exist it would not be hysteria. For instance, if the plaintiff actually had a dislocated hip there would be no hysteria about that. If the dislocation of plaintiff's hip were congenital she could use that leg. Some people are born with both hips dislocated and can get about in a way. If plaintiff's dislocated hip was not congenital and she had a sound hip when she got on the train, she could not have walked if the hip was dislocated in a wreck. She might have gotten along on the other foot. The plaintiff would certainly have known at the time if she had dislocated her hip; and she would have suffered intense pain and would have been unable to use that foot. If plaintiff's hip were dislocated it would not be in its natural position. Plaintiff could not have stepped down out of a car onto the ground and walked around and gotten back

up in the car if her hip had been recently dislocated; and the pain would have been sufficient to keep her in the car. Whether or not the displacement or curvature of the spine would have effected the plaintiff's condition would depend altogether on the degree of the displacement of the vertebrae. If it was very much of a displacement it would produce a paralysis of the parts below the dislocation. If it had been severe enough to produce paralysis it would communicate itself to the brain to a considerable degree. From the history in this case and the history as given by Dr. Kingsley, I would say that in my opinion the plaintiff could not have sat down and walked about as she did. I cannot conceive of an injury sufficient to cause the amount of inflammation as described by Dr. Kingsley and Dr. Kemp without a sufficient amount of evidence being produced immediately by the injury, such as a discoloration, that would attract the attention upon examination by a physician or be so severe she would mention it herself, at least within 10 or 12 hours after the accident. If plaintiff had the trouble she described, I do not think she would have contained herself. I attribute plaintiff's condition to hysteria and neurasthenia combined. I would not say that the operation performed on plaintiff was not necessary; but I say that is not the usual method of treatment. I would not have operated had I been in control of the situation, as I do not perform operations at all; but I have operations done and I keep in touch with such things. It is the advice and practice of most surgeons to defer the removal of the ovaries until other means have failed to produce results. I would not, under any circumstances, have operated under the conditions found by Dr. Kingsley in this case until other means had been tried and failed to produce results. It is a rule among surgeons, where a patient has been in a hospital under treatment by a physician of ability to communicate with such physician who had had the patient in charge before operating and get all the history and data possible to be obtained." (Record, pp. 239-240-241-242).

DR. HERFF, witness for the defendant, testified: "I have resided in San Antonio all my life, about 54 years. I am a physician and surgeon; and I have had quite a considerable experience as a surgeon. I have had experience as a surgeon in female troubles in a great many operations, and in the removal of the ovaries of young girls. Assuming that the testimony shows that the plaintiff was a young lady and was on a train and was in a collision; that she was seated in a chair car and was thrown forward and into the aisle and was bruised on her leg and thigh and back; that immediately following that she got up and walked out of the train and got on the ground and walked around and looked at the engines and came back into the car, sat down, and was detained there two or three hours and then went home—I would say that it would take a very severe blow to have injured the plaintiff's ovaries so that they had to be removed some six months afterwards, or to have injured her back and spine. The ovaries are so situated in the pelvis that it would have been very hard to have given them a direct blow. I do not say it is not possible to injure the ovaries by a blow; but a blow that would injure the ovaries would be noticed by the party immediately, and it would take quite a severe blow, as the ovaries are so well protected. If the party's hip had been dislocated she would not have been able to use it without considerable pain. (Rec., p. 245).

\* \* \* A person cannot use a dislocated hip immediately after the injury without a great deal of pain; and the limb might turn in or out; and such a dislocation would have shown itself within the next few hours. There is quite a difference in persons as to their hips being high or low. If any was severe enough to cause an injury to the spine it would have manifested itself and there would have been a very severe pain at the time and there would have been paralysis. You can have an injury to the spine and it would produce a compression in the canal and paralysis would come afterwards. It would not necessarily follow, however, but it depends on the amount of pressure exerted on the spinal cord itself. However, there would be pain, which would manifest itself



immediately. One can have an injury to the spine which does not manifest itself until some months afterwards. (Rec., p. 246).

\* \* \* If a person's spine is curvatures you can at least prevent it from getting more pronounced by putting on the proper appliances. Sometimes a back brace can be used. (Rec., p. 246).

\* \* \* I would not like to remove a young woman's ovaries unless I was compelled to." (Record, pp. 245-246-247). "Of course, my aim would be to save the organ if I could; and if I find the cysts are not too badly developed to interfere with the health of the organ, a part of the diseased organ could be taken out; but where there was a thorough degeneration, it would have to be removed. If both ovaries were affected, I would take out the one that in my opinion was inflamed to such an extent it could not be saved. Whether or not I would remove an ovary would depend upon the amount of cystic degeneration of the ovary. Dr. Kingsley may have thought the cysts were of recent origin, but I do not know how he could tell whether they were of recent or long standing. If I had found a condition of "little watery cysts scattered around" I would not have regarded that as such a condition as would require the removal of the ovaries in this particular case. (Rec., p. 247). \* \* \* The ovaries are well protected." (Record, p. 247). "It would require quite a severe blow to affect the womb. An injury or blow sufficient to produce a severe injury to the ovaries must be very severe. (Rec., p. 248). \* \* \* "If a fallen or displaced uterus sets up inflammation, the curing of the inflammation or trouble in the uterus would not necessarily relieve the trouble with the ovaries if the trouble were due to cystic degeneration. One may have cystic degeneration without having had a blow, as cystic degeneration is a disease. It is possible the cystic degeneration may have been present in plaintiff before her injury. Assuming that the plaintiff was a well woman before the accident, in order to bring about the condition of the ovaries found in her, it would require a severe blow, which would have been severe enough for her to know it, and which would have been severely painful." (Record, p. 249).



"It is a hard matter to say whether cysts would be formed on a healthy woman's ovaries by traumatism, and I really don't know. You can very seldom find a woman's ovary that does not have one or two cysts on it. I could not answer the question as to whether the best authorities say that cysts are not formed by traumatism, but I hardly see how traumatism could form them." (Record, p. 251).

HOMER T. WILSON, JR., witness for defendant, testified: "I am a graduate of the University of Pennsylvania at Philadelphia, and from the Bellevue Hospital of New York City. I was in the Bellevue Hospital two years. That is a large institution and accommodates about 1500 patients, and is the largest of its kind in the country. I have not heard any of the testimony in this case. Presuming the facts to be that on December 22nd, 1911, there was a railroad collision in which one train, going at the rate of 18 miles an hour, ran into another train standing still; and the plaintiff, according to her testimony, was thrown from her seat forward, falling in the aisle and some people fell on her; in about an hour she went out of the car and walked five or six hundred feet to see the wrecked engines, got back in the car and went on to her station and got out of the car and into a hack and drove several miles; during this time she suffered no inconvenience except a little nausea—I would say that I have never seen such a case and I can hardly conceive that the fall described would be responsible for her condition." (Record, p. 252). "But our principle is to resort to surgical treatment only after medical treatment has failed to bring results. If a patient was improving under medical treatment I would continue the treatment. That applies to the case at hand as well as to other cases. It is a usual thing to find cysts on a woman's ovaries, and they will be developed on a healthy ovary. Ovarian cysts are so rarely connected with traumatism that traumatism is not usually considered to be a cause of cysts; but I do not believe it to be possible for ovarian cysts to be the result of traumatism; and traumatism is

not put down as a cause of ovarian cysts. If upon examination I decided it was best to operate and I opened the cavity and found one ovary enlarged, and little minute, watery cysts, on both ovaries and some in the fallopian tubes, and some recently formed adhesions on all the parts—I will say that in such a case the mere fact that the ovary is enlarged does not necessarily mean that it is diseased; nor the fact that the ovary has cysts on it means that it should come out. In regard to the adhesions, the way to deal with those is to break them up and separate them and tie them off so as to prevent any further trouble. If only one ovary was diseased to the extent that I considered sufficient to remove it I would remove that ovary and leave the other; likewise, if one ovary and a part of another were diseased to such an extent that I had to remove them, I would remove the one and part of the other and would attempt to leave as much as possible. I would not consider it necessary to remove the ovaries of a young unmarried woman if all that was the matter was enlargement, and small watery cysts on the ovaries and in the tubes, and one of the ovaries displaced, because in removing the ovaries of a woman you produce an artificial change of life at a premature time, and that is followed by a nervous condition which is advisable to avoid, if possible." (Record, pp. 253-254).

W. L. CHEW, witness for defendant, testified: "I am claim agent for the Texas & Pacific Railway Company. I have been with that road since 1887. (Record, p. 255). On my first visit Miss Hill complained of injuries, but I do not remember how she said she was hurt. The next time I saw the plaintiff she was in Dr. Dale's sanitarium. (Record, p. 255). The next time I saw her was at her father's house in Queen City, where I first saw her. She was up and about, walking about the room dressed. If the plaintiff was hurt she did not mention any specific injury. (Record, p. 256). The first time she ever complained to me of any specific injury was at Pearsall, some time in May, if I remember correctly, when she said there was something the matter

with her hip in addition to other injuries. I got the letters which counsel exhibits to me. If one of those letters mention the hip, I learned about it just before the date of that letter, as I was in Pearsall and she told me that Dr. Williamson said she had a broken hip or dislocated hip joint which my doctors had not discovered." \* \* \* \* That letter may be the first time I heard of the dislocated hip, and it was on that trip that Dr. Williamson explained to me about it. I had a talk with Dr. Williamson and he said the plaintiff's hip was broken or dislocated. I went to see Dr. Williamson about plaintiff's condition, as she told me he was her doctor. Dr. Williamson said he found plaintiff had a dislocated hip which the doctors had not discovered, but he did not mention specifically any other injury which he had found. Prior to the operation there was no claim except that her hip was dislocated, although she claimed to be injured." (Record, p. 256). "Every time I went to see the plaintiff was after I had received a communication from her or her sister to come." (Record, p. 257).

Upon cross-examination he stated: "The first time I learned the plaintiff was going to be operated on was when she telegraphed me herself. I have that telegram. She said in the telegram, 'I am going to the sanitarium with the doctor tomorrow.'" (Record, pp. 258-59).

He further testified: "When I learned she was going to be operated on that was the first news to me and I sent Dr. Strawn to San Antonio to see her. (The reason I sent Dr. Strawn to see the plaintiff was because I had seen the plaintiff at Pearsall and she looked so much better than she did up at Queen City that I really did not believe she needed an operation and I sent Dr. Strawn to see her and to see what he thought about it. The plaintiff told me who the learned doctor was that was going to operate on her, but I did not know him. I either learned it from Dr. Strawn or I learned it at the time of the operation.)

I sent Dr. Kingsley a long courteous message asking that the chief surgeon or consulting surgeon be allowed to be present at the operation. He did not reply to me at all and I understood his action to be a refusal. I saw Dr. Kingsley afterwards, and I have had an interview with him recently. I also wrote him and asked him to tell me specifically what was the matter with plaintiff. I also sent him a lot of questions. He replied to me and refused to give me the information unless we paid him. He refused to tell what was the matter without consideration." (Record, pp. 259-260).

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Here are the letters:

"Melon, Texas,  
April 15, 1912.

Mr. W. L. Chew,

Dear Sir: Your letter received a few days ago, have been real sick since I last wrote to you. The doctor I had with me, discovered my hip bone was out of place, said he hated to discourage me, but he didn't think I ever would be strong again, about two or three weeks is about as much as I am up at the time. I am at my sister now, but will be back in Pearsall in a few days. So if you want to come it is all right with me, I am sure you can settle with me have put in such a reasonable claim." (Record, p. 283).

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"Pearsall, Texas,  
May, 9, 1912.

Mr. W. L. Chew,

Dear Sir: After talking with you last Friday, I have since consulted my Bro. in Law Mr. McKinley about the matter. And I have decided to let a lawyer have my case against you,

unless you all come across with the amount I ask for, within the next fifteen days," etc.

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DR. D. BERRY, witness for plaintiff testified: "My name is D. Berry. (I have been practicing as physician and surgeon about 26 years, and I have been practicing in San Antonio a greater part of that time." (Record, p. 261). "It would take direct violence to effect either the appendix or the ovaries, as the ovaries are pretty well protected. Of course, if a woman was thrown so as to double the body up and make a strong pressure against the womb or ovaries you might get a displacement in consequence of that pressure. I would think the position of the body would have as much to do with it as the force of the traumatism or blow. Anything that would have a bad effect on the nervous system might produce neurasthenia. If the plaintiff did not have neurasthenia when she got on the train and had it afterwards, I would be compelled under those circumstances to attribute the neurasthenia to the wreck. (Record, p. 263).

Upon cross-examination, he testified: "I expect plaintiff would have known it at the time the hip was knocked up, and there would have been pain connected with it. If plaintiff had received a dislocation or fracture of the pelvic bones she could not have walked out of the car. (Record, p. 264). I examined the plaintiff in May, 1912, and also examined her about three days ago. I think the subject of the X-Ray was spoken of at the time, but I do not know why it was not made. When I examined the plaintiff in May, 1912, she was stripped, and pretty much the same examination was made three days ago. She was in bed at the Bexar Hotel and was not on an operating table." (Record, p. 264). "I do not know why I was not present when the operation was performed. When I examined plaintiff **discovered there was a dislocation of one ovary and some fever**, and evidently some inflammatory changes going on inside. I also found the womb was

twisted upon itself. I could feel the condition of the womb at time, and I most assuredly knew it existed at the time. (Record, p. 264). If I had found a few cysts on plaintiff's ovaries and nothing more, I would not have removed the ovaries. If plaintiff's condition at the time of operation, was "one of general inflammation throughout the pleviis and lower abdominal tissues; the ovaries were enlarged and bound together by adhesive bands or adhesions as a result of the inflammatory condition, and in all the pelvic organs about the womb, the tubes and ovaries, and the adhesions were comparatively recent origin, 'I do not know that I would have treated the adhesions first and separated them; but it would have depended entirely upon the condition of the ovaries. Certainly, the proper thing to do would have been to break up the adhesions. That is what I would have done with the adhesions. (Record, pp. 265-266). "In an injury of that kind rest is the proper thing to give the patient, and I am satisfied that at Dr. Dale's hospital the plaintiff had every attention and care; and if she did improve it was due to the care and treatment and rest which she got there. I would have given a young unmarried woman such as the plaintiff, every chance possible to recover before removing her ovaries; that is regarded as conservative surgery, which is always good surgery. Good surgery always goes slow in removing a woman's ovaries, and they ought to go slow." (Record, p. 267). "I was not invited to be present at the operation; and I do not know why. \* \* \* \* \*

J. B. ELDRIDGE, witness for plaintiff, testified: "I live at Pearsall, Texas, I am in the mercantile business and farming business there." (Record, p. 269). "She was working for me at the time she left on this trip to Queen City." (Record, p. 270).

On cross-examination, he testified: "I think the plaintiff worked for me about two years. Her sister was not working for me at the time. The plaintiff was constantly on her feet at my place of business, and was busy the biggest part of the time. She



was standing up through the day, and day after day." (Record, p. 270). \* \* \* \* \* Mr. McKinley also came up from Pearsall with me, Mr. McKinley is the plaintiff's brother-in-law. \* \* \* First time I saw her was at the Bexar Hotel. I do not know what she was doing, but I went to the hotel and sent for her and she came down from her room. I do not think she came down stairs, but I think her room was on the same floor as the parlor. When she came she was walking. (Record, p. 271). The plaintiff returned when I did to Pearsall. \* \* \* \* \* The plaintiff came down in the elevator at the hotel, but I do not remember whether I assisted her from the elevator to the cab or not. I think she walked right along though. I think plaintiff was able to walk when she got to the train, and did not see anything unusual about her walk. She got to the train in Pearsall the same way. When we were here I know Dr. Kingsley did not secure the services of an attorney, as I went with him and talked with Mr. Lewis and got some advice from him, but we did not secure his services at that time. I do not know whether Mr. Lewis, attorney for plaintiff, saw the plaintiff at that time or not, but I heard him say he thought he would go and see her that evening. I am a friend of the plaintiff's family, and I am assisting her financially. I am helping her all I can and am very much interested in her case. \* \* \* (Record, pp. 271-272).

DR. S. P. CUNNINGHAM, witness for defendant, testified: " \* \* \* \* \* If a young woman, such as the plaintiff, had experienced a shock which would have been sufficient to injure the ovaries, it certainly would have caused some external evidence. She would have at least said something and would have felt some pain immediately." (Record, p. 275). "A hip one inch out of place would be far enough out of place to be out of normal position. I would certainly think there would be some outer symptoms evidenced immediately following a blow severe enough to cause curvature of the spine, and the person would not have been able to walk." I do not think the plaintiff could have walked so

soon after the accident as she did had she had a dislocated hip or even had a jar severe enough to cause curvature of the spine at the time. (As a rule, if a young woman's ovaries are cystic, the cysts should be opened up and the ovaries should not be removed. If the ovary has some condition where it is thoroughly diseased, the cysts should be opened up; and if the cysts were large enough to involve a part of the ovary, a part of the ovary should be taken out and a part left, as the removal of an ovary has a tendency to increase nervousness. A person would get well after the removal of the ovaries, but the nervous state of the person naturally increases.) (Record, pp. 275-276). "In the case of a young woman who worked in a store continuously, it would have a tendency to produce displacement of the womb because of being on her feet continually; and especially is this true right along during the menstrual period when the womb is heavier than at other times. The condition plaintiff was in is likely to have been the result of continuous overwork or strain, or things of that kind. As a rule and according to the best authorities and to the concensus of opinion, if a neurasthenic's attention is called to the pelvic organs, it rather enhances her symptoms instead of diminishing them." (Record, p. 276).

He further testified: "If the plaintiff had received such a blow that it brought about the injuries complained of, she would have some symptoms and some pain and fever with it. If she did not have these symptoms I do not believe the blow was sufficient to produce her condition." Record, p. 277).

DR. JOHN R. DALE, witness for defendant, testified: "A record of the plaintiff was kept by the nurse from the time plaintiff went to my hospital. That is always done." (Record, p. 280). \* \* \*

#### AUTHORITIES

St. Louis, etc. Ry. Co. vs. Bragg, Am. State Reps. Vol. 86,



p. 206 (69 Ark. 402; 64 S. W. 226), holding among other things, damage cannot be recovered for mere fright or mental shock. This is the theory of plaintiff's case.

Cole vs. German Savings & Loan Soc., 59 C. C. A., p. 595;

Stone vs. Boston & A.R.Co. 41 L.R.A. 798;

Snyder vs. Colorado Springs etc. Ry. Co., Vol. 118, Am. State Rep. p. 111.

### FIFTH POINT OF LAW

(Assignment of Error No. 5, Rec. 363)

(See First Assignment, p. 361. Also Eleventh Assignment, p. 366)

(Bill of Exception No. 1, p. 77)

When a suit is instituted against two defendants, alleged to be partners and jurisdiction obtained on that theory, and both held in Court to fix venue and jurisdiction, the instruction to the jury that there was no evidence developed on the trial against the I. & G. N. Ry. Co., (which of course has reference to partnership liability) to find for it, and to proceed against the Texas & Pacific Railway Co., was error, and ousted the Court of any further jurisdiction in the case on the plea and exception; and such finding and conclusion of the Court required an instruction likewise of dismissal against the Texas & Pacific Railway without prejudice, and the Court should have given special charge No. 2, (Rec., p. 49) requested.

The Court charged the jury as follows:

"In this case I charge you that the evidence has not developed any liability on the part of the defendant, International & Great Northern Railway Company, and I therefore charge you that you must return a verdict for this company, and proceed to consider the case against the Texas & Pacific Railway

Company, under the following instructions." (Record, p. 44).

Special charge No. 2 requested, refused is as follows:

"If under the circumstances herein given you, you find for the defendant, the International & Great Northern Railway Company, I further charge you you cannot find for the plaintiff, against the Texas & Pacific Railway Company, and you will so find." (Record, p. 49).

See same question raised under first point of law under first assignment discussed herein.

This was the ruling of the Court in the whole case which in effect sustained defendant's plea, and a practical dismissal of the I. & G. N. on the plea, which plea was likewise adopted by the T. & P. Ry. Co.

#### AUTHORITIES

Glasscock vs. Price, 92 Tex. Rep. p. 274.

#### SIXTH POINT OF LAW

(Assignment of Error No. 6, Rec. p. 363)

(Bill of Exception No. 4, Rec. p. 101)

It was error to charge the jury to assess damages received, to compensate her as set forth in her petition, leaving for the jury to search out the legal claim upon some of which there was no evidence. The charge being a practical instruction of a verdict for plaintiff, and directed jury: (a) To take in consideration, reasonable expenses incurred for drugs, hospital services and medical and surgical treatment for any injuries she may have received. (b) Damages for mental and physical suffering, if any, which the plaintiff has undergone. (c) For any mental and physical suffering which any injuries will produce upon plaintiff in

the future. (e) For such further permanent injuries that will diminish the plaintiff's capacity to labor and earn money in the future. It is not only an incorrect instruction, but a duplication of damages.

The charge of the Court is as follows:

"2 The evidence shows that there was a collision between two of the Texas & Pacific Railway Company's trains, and that the plaintiff was a passenger upon one of said trains. If you believe from the evidence that the plaintiff directly received any of the injuries alleged in her petition by reason of said collision, then I charge you that your verdict must be for the plaintiff in such a sum as will fairly compensate her for any such injuries as were received and set forth and claimed by her in her petition; and in assessing damages you should take into consideration the reasonable expenses which the plaintiff has incurred for drugs, hospital services, and medical and surgical treatment, which you may find were reasonably necessary in the proper treatment of any injuries which you may find she received. In estimating damages, you will also take into consideration the mental and physical suffering, if any, which the plaintiff has undergone by reason of any such injuries; and if you find that any such injuries are permanent, you should also consider any mental and physical suffering which any such injuries will produce upon plaintiff in the future. And if you find that any such injuries are permanent, and that they will diminish the plaintiff's capacity to labor and earn money in the future, then I charge you that this element of damage also should be considered." (Record, p. 45).

Attention of the Court was called to the errors in charge, bill of exception No. 4, Record, p. 101.

## AUTHORITIES

Champagne Lumber Co. vs. Nybach, 64 C.C.A. 615;

Memphis & Charleston Railroad Co. vs. Whitfield, 4 American Neg. Cases, p. 268 (44 Miss. 466);

Nat. Bis. Co. vs. Nolan, 70 C.C.A. 441;

Ry. vs. Butcher, 98 Texas, 462.

Ry. vs. Hoyter, 93 Texas, 239.

Ry. vs. Shafer, 54 Texas, 641;

Ry. vs. Simock, 81 Tex. 503;

Ry. vs. Brock, 88 Tex. 310;

Ry. vs. Measles, 81 Tex. 474;

Ry. vs. Hightower, 33 S. W., 541.

## SEVENTH POINT OF LAW

(Assignment of Error No. 7, Rec. p. 364)

(Assignment of Error No. 8, Rec. p. 364)

(Assignment of Error No. 9, Rec. p. 365)

(Bill of Exception No. 4, Rec. p. 101)

The Court erred in eliminating all defenses, made in the entire case, by this charge, and (a) erred in charging jury, plaintiff would not be responsible for the errors or mistakes of the surgeon who performed the operation, provided she used ordinary care in the selection of a reasonably competent surgeon and submitted her case to his judgment. (b) If she received hurts in said collision which led to the injury and impairment of her ovaries, if she used ordinary care in the selection of a reasonably competent surgeon, such a person of ordinary prudence would have exercised, under similar circumstances, and did employ a reasonably competent surgeon to perform said operation and that he, acting upon his judgment, removed her ovaries, **defendant**

would be liable for condition produced by reason of said ovaries being removed, notwithstanding some other course pursued by the surgeon might have saved the removal of her ovaries. The charge is, a practical instructed charge for the plaintiff entirely upon one issue of the case. It is contradictory in respect to her duty in selecting a surgeon, and charges the jury to find against defendant upon every issue in the case, whether the surgeon was competent or otherwise, whether it was necessary to remove her ovaries or whether she would have gotten well by proper treatment that would not have required the removal of her ovaries.

Paragraph No. 3 of the general charge is as follows:

"3 In this case the defendants charge that the operation and removal of the plaintiff's ovaries was unnecessary, and that the surgeon who performed said operation was guilty of malpractice. In this connection I charge you that the plaintiff would not be responsible for the errors or mistakes of the surgeon who performed the operation, provided she used ordinary care in the selection of a reasonably competent surgeon, and did select a reasonably competent surgeon, and submitted her case to his judgment. If you find from the evidence that the plaintiff received hurts in said collision which led to the injury and impairment of her ovaries, and if you further find that she used ordinary care in the selection of a reasonably competent surgeon, that is, such care as a person of ordinary prudence would have exercised under similar circumstances, and did employ a reasonably competent surgeon to perform said operation, and that he, acting upon his judgment removed her ovaries, then I charge you that the defendant would be liable for the condition produced by reason of said ovaries being removed, notwithstanding some other course pursued by the surgeon might have saved the removal of her ovaries." (Rec., p. 25).

Paragraph No. 4 of the general charge is as follows:

"4. The defendant charges that the plaintiff is malingering—that is to say, that she is not really injured as she claims to be, but is pretending to be so injured in order to recover a judgment against the defendant for damages to which she is not entitled. Whether the plaintiff was really hurt in the collision before mentioned, or whether she is malingering, is a question which is submitted to you to be determined from a consideration of all the facts and circumstances in evidence. Should you find that the plaintiff was not injured in said collision, then your verdict should be in favor of the Texas & Pacific Railway Company." (Record, p. 46).

We especially likewise called the Court's attention to the errors in the general charge, bill of exception No. 4, Rec. p. 101, which we trust the Court will carefully read in this connection.

It must be borne in mind that Dr. J. C. Strawn and John Dale were doctors selected by her, and who treated her. (Rec., pp. 110-111), also (Rec., pp. 209-221) She did not follow their advice. They both said the operation was improper in effect.

#### AUTHORITIES

Texas & P. Ry. Co. vs. McKenzie, 70 S. W. 237, 30 Tex. Civ. App. 273.

Railway vs. McMannewitz, 70 Tex. 73.

M. K. & T. Ry. Co. vs. Hagan, 93 S. W. 1014.

St. L. S. Ry. Co. vs. Johnson, 94 S. W. 162.

Robertson vs. T. & P. Ry. Co. 79 S. W. 96.

Texas Portland Cem. Co. vs. Poe, 74 S. W. 563.

Trinity & S. Ry. Co. vs. O'Brien, 46 S. W. 389.

St. L. S. Ry. Co. vs. Parks, 90 S. W. 343.

Tex. & P. Ry. Co. vs. White, 101 Fed. 928, 42 C. C. A. 86.

Chicago City Ry. vs. Saxby, 104 Am. St. Rep. 218.

Chicago, B. & Q. R. Co. vs. Richardson, 121 C. C. A. 144.

## EIGHTH POINT OF LAW

(Assignment of Error No. 10, Rec., p. 365)

(Bill of Exception No. 4, Rec., p. 101)

The further error in the general charge of the Court was instructing the jury that the plaintiff would not be held responsible for her want of care in having the operation performed whether necessary or not, just so she had it performed by a doctor she used care in selecting.

## AUTHORITIES

Same as under foregoing proposition.

By exceptions contained in Bill No. 4, Rec., 101, the Court's attention was directed specially to the errors in the charge.

Our contention in this connection as a proposition of law is:

(a) Whether there was an injury to the organs necessitating the particular operation was an issue for the jury, on defendant's proof, to determine and the Court should have submitted to the jury, whether or not she used ordinary care in first ascertaining, by making preparation for the restoration of her health, before selecting any surgeon to perform any such operation:

(b) Whether her condition required the operation:

(c) Whether the operation eventually was made by a doctor who removed more of the plaintiff's organs than was necessary, to restore her health:

(d) Whether she received the injury, if any, on the train, which was or was not, such as to cause the condition stated by the surgeon, who performed the operation, the plaintiff having

alleged she received a **severe shock and concussion**, and by reason thereof, her nervous system was severely shocked and injured, and impaired, and did not then claim to be injured. It is nowhere alleged that she **was hurt** on account of the collision or that she received hurts in said collision, and the only injuries she received, pleaded by her, were injuries received from "**shock and concussion**" and not by any other injury that **hurt her**. The Court's attention was called specifically to the failure of plaintiff to allege any hurt or injury other than was occasioned by a severe shock, and it was upon this petition that the case was tried, and the Court erred in submitting any other injury than alleged for the consideration of the jury.

(e) And the Court erred in making, as the Court did, the plaintiff's cause of action on account of the operation and her recovery therefor, depend as to whether she employed "a reasonably competent surgeon to perform said operation." Refused to submit any issue as to whether she ought to have used ordinary care in relieving herself from such injuries before going under the surgeon's knife, or using ordinary care in avoiding an operation, **rather than her right to recover for injuries** done to her, if she did employ "a reasonably competent surgeon to perform said operation," and not leaving for the jury to say whether she ought to have been operated upon or not, or whether it was necessary and she would have gotten well and saved her organs if she had used ordinary care and remained under treatment of Dr. Strawn or Dr. Dale—or had some other like treatment instead of surgery.

(f) The Court refused to submit in its general charge to the jury, defendant's defense that she was induced to submit to the operation, whether necessary or not, or if the operation was wholly unnecessary, or whether it was on account of plaintiff's condition prior to the time when the operation was made upon her.

(g) That the plaintiff had or would have gotten well and re-



covered from the effects of the injury and that the operation upon her was not the direct and immediate result of the injury caused by the "shock and concussion" in the alleged accident, but was on account of her own carelessness and want of care in allowing the said operation to take place, and was the proximate cause of the loss of her ovaries, when it was not necessary and contributed to her injuries."

#### AUTHORITIES

Hailis Curator vs. T. & P. Ry. Co., 60 Fed. 557-59, 9 C. C. A. 134, 23 L. R. A. 14;

Maynard vs. Oregon R. Co., 72 Pac. 590, 43 Ore. 63;

Lobban vs. Wabash Ry., 141 S. W. 440.

H. & T. C. R. R. Co. vs. Shafer, 54 Texas, 641.

G. C. & S. F. Co. vs. Hayter, 93 Texas, 239.

Throckmorton vs. M. K. & T. Ry. Co, 39 S. W. 174, 14 Texas C. A. 222.

Waxahachie vs. Connor, 35 S. W., 692.

#### REMARKS

We called Court's attention to errors in main charge, bill of exception No. 4. Rec. 101.

The contention of counsel below in their brief and in the argument is that the three requested charges, requested by plaintiff in error, and given by the Court (Rec., pages 55-56 and 57) cured any claimed error in the Courts general charge and error in refusing the requested charges complained of, we beg to dissent from such contention.

Would Miss Hill have gotten well if she had continued under the treatment of her first two doctors, Strawn and Dale?

Is not this a question worthy of consideration and answer? They said she would, and she said she improved.

Did she use ordinary care in dismissing them, and selecting another Doctor to operate on her?

It is not like a question where one had an undisputable injury, and all the doctors agreed an operation was necessary, whereupon *she*, for the first time, selected a doctor to perform it. But the question is that her first doctors were curing her, and she left them and experimented with another. Bear in mind, all the doctors were of her own selection.

Did she use ordinary care in leaving her first doctors, who were curing her, and thereafter select a doctor to operate when it was **not necessary**? This is surely a question of fact, not of law, and the Railway was entitled to have that issue go to the jury. The charge given does not bar us here.

It will be seen that the charges given did not help us on that issue with the jury, for the Court said specifically:

"I charge you, that the defendant would be liable for the condition produced by reason of said ovaries being removed, notwithstanding some other course pursued by the surgeon might have saved the removal of her ovaries."

Surely this is not the law.

The first special charge given, was on the issue she had gotten well—before the operation. The jury could well find she had not gotten well from the shock, and yet, if permitted, could have found, no operation was necessary, because she would have gotten well without.

The second special charge given was to the effect that if they "believe the injuries received by plaintiff were not the direct and proximate result of the railroad accident, then you will find for the defendant." This did not relieve it of the error in the charge of the Court for its refusal to submit the issue contended for, and the vice claimed, because they could find easily she was injured in some degree by the fall or alleged shock, and yet could have found, if permitted, that it was not necessary to perform the operation to save her ovaries, because she would have gotten well without.

The third special charge given is to the same effect; that they were to consider no damages that arose subsequent to the injury, but only those that "followed in an unbroken sequence from the injuries there received, and were directly and proximately caused and produced by the hurt she received in the collision."

The jury could find that she was slightly injured by the fall, shock and fright, and had not recovered therefrom, when she was hurried to the too-ready surgeon to use his knife, and operated when her first splendid doctors stood ready to cure her without the use of a knife, had she permitted, and the jury, even so believing, could not find for the defendant because the Court had charged them direct, in effect, to find for the plaintiff "if she used ordinary care in the selection of a reasonably competent surgeon"—also charged she "would not be responsible for the errors or mistakes of the surgeon who performed the operation"—and the charge went on to conclude—"the defendant would be liable for the condition produced by reason of said ovaries being removed, notwithstanding some other course pursued by the surgeon might have saved the removal of the ovaries."

We cannot see how our learned adversaries can take such a position.

There is nothing in the three special charges given that can be remotely used to relieve the burden the Court placed upon the defendant, by its charge shown, he had a right to have the verdict of the jury, as to whether she would have gotten well if she had followed the advice of her first doctors, and used ordinary care to cure herself instead of pursuing the drastic course taken by the very radical doctor, finally selected by her to do this job, but was no more her doctor than Strawn and Dale, whom she would not follow.

At what point and at what time did she exercise ordinary care to cure herself, or did not?

We have taken a little time to discuss these special charges, because in the brief and oral argument in the Court below, so much time and energy was used in attempting to show the Court we had waived even by these requested charges, by our adversaries.

We can treat the sixth, seventh, eight, ninth and tenth assignments, together as they raise practically the same exceptions to the Court's general charge which is a practical instruction for plaintiff upon plaintiff's theory, notwithstanding defendants defenses. In the general charge, beginning on Record page 44, the matters therein submitted are:

1st—Peremptorily find for the International & Great Northern Railway Co.

2nd—Then the Court peremptorily instructs **there was a collision and plaintiff was a passenger.**

3rd—Instructs if the jury believe "plaintiff directly received any of the injuries alleged in her petition by reason of said collision," find for the plaintiff.

4th—How to assess damages.

5th—Plaintiff **not** responsible for the errors or mistakes of her own surgeon selected by her, who performed the operation, if she used ordinary care in his selection, etc.

6th—Instructs defendant **would be** responsible though some other surgeon **would have cured her** and might have saved the removal of her ovaries.

7th—Submits only the **sole** question of plaintiff's "malinger-ing" and

8th—If plaintiff **was not** injured in said collision, then, etc., she was not to recover. She was in the collision.

It will be seen from the foregoing analysis of the Court's charge, **none** of defendants material defenses were submitted, except "malingering" and whether she **was** injured, though the Court's attention was thereto directly called to the same by bill of exception taken at the time. The Court did submit, as stated, one defense pleaded, of "malingering," which was specially made prominent by plaintiff's attorneys, to prejudice the jury against defendant, but no other more important ones, upon which defendant greatly relied. Counsel for plaintiff criticised defendant, as it were, for **daring to say** plaintiff "**malingered**," and it must have been impressed thereby upon the mind of the Court.

Under the Court's charge, it was **only** necessary for the jury to find **she was** injured, it made no difference **how slight**, and that her ovaries were removed by a surgeon she thought was competent, however incompetent or prone to use the knife, who performed a serious and unusual operation, whether necessary or not, upon this young unmarried girl, then to assess damages for mental and physical suffering **which any** "such injuries will produce upon plaintiff, in the future" as well as diminished capacity to labor and to make money.

This case is "passed up" as a shining example of the method of treating females by surgeons the railroad is to pay for but did not select. The measure of damages submitted by the trial judge was most generous to the plaintiff, since the only limitation set forth in the charge, besides the "blue skies," was for the jury to read the petition for plaintiff's claim and "go to it," if she were injured at all whether she used ordinary care to save herself from the remote consequences or not.

#### NINTH POINT OF LAW

(Thirteenth Assignment, Rec. p. 366)

(Bill of Exception No. 7, Rec. p. 287)

As the plaintiff's suit was solely predicated upon injuries received from "shock or concussion" by reason of the alleged collision, it was error not to give special charge No. 5, requested (Record, p. 50), limiting the investigation to injuries received, caused from the "shock and concussion," and not any remote injury resulting from traumatism or blow or hurt of some kind; there being no allegation to support such recovery.

The special charge is as follows:

"If you believe from the evidence that the plaintiff had the operation performed, as alleged, on account of hurts received in the accident, you cannot consider any injury that came to her from the same unless it came as a result from the shock received in said train or from concussion, there being no allegation in plaintiff's pleading that the injury was received in any other way; and in consideration the injuries received from them or from the collision, you will disregard every element of injury that could flow entirely from traumatism, that is, a blow of some kind." (Rec., p. 50).

## AUTHORITIES

Haile's Curator vs. Tex. Pac. R. R. Co., 9 C. C. A. 134 (60 Fed. 557).

G. C. & S. F. Ry. Co. vs. Hayter, 93 Texas, 229.

Ry. Co. vs. Shafer, 54 Texas, 641.

Throckmorton vs. Ry., 14 T. C. A., 222.

Waxahachie vs. Connor, 35 S. W., 692.

Bill of exception No. 4, Rec., p. 101, called Court's attention to errors in main charge.

## PROPOSITION OF LAW

(Fourteenth Assignment of Error, Rec. p. 367)

(Bill of Exception No. 9, Rec. p. 291)

It was error not to give Special Charge No. 6, Bill of Exception No. 9 (Record, p. 52), to the effect if plaintiff's prior sickness was the proximate cause of her condition which would not have required an operation, for any injuries that did occur or were the direct and proximate cause of her own negligence in having the unnecessary operation performed, the railroad would not be liable for damages the result of such operation. This involved an issue of fact for the jury, arising under the pleading and evidence.

Special Charge No. 6 is as follows:

"If you believe that the plaintiff's condition as alleged by her, was brought about by reason of her prior condition and her acts and conduct thereafter, and any injuries resulting from the operation, and the others would not have occurred except for the result of her own negligence in having said operation performed, as no person of ordinary care and



prudence would have undergone, and notwithstanding the alleged act of negligence upon the part of the railroad, the present injuries are the direct and immediate result of said act, following in natural and unbroken sequence, and the railroad company was not guilty of any negligence resulting from her alleged injuries which were the proximate result of her said accident in the defendant's trains of cars, but was on account of her own carelessness and want of care in allowing said operation to take place, which was the proximate cause of her injuries, you will find for the defendant." (Rec., p. 53).

It was shown by doctors that the **presence of cysts** are not the result of a blow, but **must** have been there a long time. See testimony of Dr. Dale (Record, p. 227). Also testimony of:

Dr. Herff (Record, p. 247);

Dr. Dorbant (Record, p. 238);

Dr. Wilson (Record, p. 253);

Dr. Cunningham (Record, p. 275).

That she had taken patent medicine. (Rec., p. 278). That she had female trouble prior, etc. (Rec., p. 213). If she had the previous trouble upon which there was an issue of fact, and if the operation was not necessary, as many of the doctors say, we specially refer to their testimony herein quoted under Point of Law No. 5. That she would have gotten well without the operation **was** an issue of fact for the jury, as we feel sure she would have, and whether she exercised ordinary care in leaving the treatment of Dr. Strawn and the celebrated and learned Dr. Dale who were curing her. The testimony to support this proposition is set out under Point of Law No. 4 herein, and not necessary, we presume, to repeat but refer to as a part of this.

The doctors say if she was improving under Dr. Strawn

and Dale's treatment, she might have gotten well. This was proven by other doctors as shown by their testimony more fully set out above under Point of Law No. 4, to which we refer. Also by report of nurses (Record, p. 296), who show her condition from day to day. Bill of Exception No. 11, Record, p. 296.

### AUTHORITIES

Same as heretofore.

Kirby Lumber Co. vs. Cunningham, 154 S. W., 289.

### TENTH POINT OF LAW

(Fifteenth Assignment of Error, Rec., p. 367)

Bill of Exception No. 10, Rec., p. 293

Special Charge No. 9 requested and refused, Rec., p. 51

There were issues of fact in the case on the following points, as to whether plaintiff was a neurasthenic and influenced and persuaded to have the operation when not necessary. (a) That she would have gotten well by proper treatment. (b) That she did not use proper care to get well and get cured but selected a doctor to operate on her when it was not necessary, when she would have been cured without removing the ovaries. (c) Then the railroad would not be responsible for the consequences of such an operation if she would have gotten well with proper treatment. (d) Then the jury should not consider damages for "the operation upon her and the removal of any other organs" but "only assess damages, such damages as arose from the injury otherwise," all of which by the action of the Court by its charge was taken from the jury. The special charge is:

"You are instructed that if you believe from the evidence that at the time the plaintiff was operated upon that she was

a neurasthenic and was suffering from neurasthenia, and that she was influenced to submit herself to the surgical operation when it was not necessary and when other treatment would have entirely cured and relieved her, and that she did not use and exercise ordinary care, and such want of care, if you believe she did not exercise proper care, caused her to select a doctor when it was not necessary, and that her act contributed to the injury, then the railroad company would not be responsible in damages for the consequences of the operation that was performed upon her; and you will, in summing up the amount of damages, you find she was entitled to, if any, not consider the operation upon her and the removal of any of her organs in finding a judgment and assessing damages, against the defendant, but will only assess such damages as arose from the injury otherwise than as hereinabove instructed." (Rec., p. 51).

#### AUTHORITIES

- Tex. & Pac. Ry. Co. vs. White, 42 C. C. A., 86 (101, Fed. Rep., 928 and reported in L. R. A., Vol. 62, p. 90, see annotations).  
Trinity & S. Ry. Co. vs. O'Brien, 46 S. W., 389.  
Tex. Portland Cement Co. vs. Poe, 74 S. W., 563.  
Robertson vs. T. & P., 79 S. W., p. 96.  
M., K. & T. Ry. Co. vs. Hagan, 93 S. W., 1014.  
St. Louis S. W. vs. Johnson, 94 S. W., 162.  
Chicago City Ry. Co. vs. Saxby, Am. State Rep., 218 (213 Ill., 274; 72 N. E., 755). See annotations.  
T. & P. Ry. vs. McKenzie, 70 S. W., 237 (30 Tex. Civ. App., 273).  
Ry. vs. McMannewitz, 70 Tex., 73.  
Issue should be submitted:  
Patton vs. Southern Ry. Co., 27 C. C. A., 287.  
Cole vs. German Sav. Soc., 59 C. C. A., p. 595.  
Swift vs. Langbein, 62 C. C. A., 111.

Posner vs. Harvey, 125 S. W., 356.

Ry. vs. Shafer, 54 Texas, 641.

Throckmorton vs. M., K. & T. Ry. Co., 14 Texas C. A., 222.

Waxahachie vs. Connor, 35 S. W., 692.

We were allowed no defense, no inquiry by the jury as to such matters plead, though there was ample testimony to support our theory and to show the operation was neither needed nor necessary to restore her health, yet the Court only submitted the question whether she was injured at all and whether she malingered. Under this charge she could recover for every injury to her other than caused for the surgical operation, and she could recover for that, if she exercised the ordinary care mentioned. We refer to the testimony set out under Point of Law No. 5, Rec., 105.

#### ELEVENTH POINT OF LAW

(Seventeenth Assignment of Error, Rec., 368)

Bill of Exception No. 11, Rec., p. 296

The Court should have granted a continuance—a new trial. While this Court will not ordinarily review the action of the trial Court in refusing to postpone a case (see Rec., p. 89) or cut down an excessive verdict or grant a new trial (Rec., p. 62), and may not follow the Texas law on the same subject, yet the Court's action in any case where timely exception is taken and the trial Court's attention is properly and timely called to it, will be reviewed, if such amounts to a substantial error, such ruling when shown to be arbitrary or an abuse of power, will authorize the Court to review the whole record to the end that substantial justice may be meted out and reverse the case with instructions. The verdict was excessive and should have been reduced—or new trial awarded.

## AUTHORITIES

Champagne Lumber Co. vs. Nyback, 64 C. C. A., 616.

Southern Pac. Co. vs. Rauh, Vol. 1, C. C. A., p. 416.

Nat. Bis. Co. vs. Nolan, 70 C. C. A., 436 (at bottom page).

No verdict obtained on the facts in this case should or ought to stand. The direct attention of the Court was called to all these matters by the motion for new trial. (Rec., p. 62).

Claiming to have been in a collision only sufficient to shake most passengers up a little and hurt no one very seriously, must make the average person wonder at the result of this case and its progression, from a slight jolt, causing a "shock or concussion" to a hospital where under proper attention she was getting well, to a sudden leap to a too willing surgeon's table, who held a ready knife, the panacea for all undisclosed abdominal complaints, complaining of a dislocated hip—wonderful evolution!

She got out of the train, walked about, went outside, looked at the engines, returned to the car, stepping high, to get up and down the steps, went home, was sick, went to the hospital, improved, returned to Pearsall. All this time she had walked about until she went to Dr. Williamson, then we find her on April 15, 1912, writing Mr. Chew, the Claim Agent, "the doctor I had with me, discovered my hip bone was out of place, said he hated to discourage me, but he didn't think I ever would be strong again. \* \* \* I am sure you can settle with me, have put in such a reasonable claim."

She was then at her sister's. Her sister was seated with her at the time of alleged accident and had been managing the settlement. Now here we find the plaintiff looking forward to a settlement. Besides her sister, she has the doctor who told Mr. Chew he had discovered "plaintiff's hip was broken or dis-

located." (Rec., p. 256). Though called upon by the Claim Agent for information, neither stated nor claimed any other injury. We have not quoted from his testimony at all.

On May 9th, 1912, plaintiff again writes she has "consulted her Bro. in Law Mr. McKinley; \* \* \* he decided to let a lawyer have my case against you unless you all 'come across' with the amount I ask for within the next fifteen days. \* \* \* Will remain here awhile under Dr. Williamson's treatment." (Record, p. 282).

This desire for money was, clearly developed, and here we begin to suspect the purpose and see the influence operating on her mind, for a "come across with."

There was a sharp conflict between doctors as to the necessity of the operation. Dr. Dale, the noted specialist, who had her under his care, stated positively there was nothing the matter with her organs such as, required an operation (Record, p. 231), and he and Doctors J. C. Strawn, Thomas Dorbandt, Herff, Homer T. Wilson, Jr., and S. P. Cunningham, other able surgeons stated there was nothing stated by Dr. Kingsley that showed the necessity for an operation. The testimony quoted shows that she would have gotten well without the operation.

This raised a positive issue of fact which the Court both by direct charge and by refusal to give the special charges requested by defendant, cut off a most material defense. In other words, the Court directed a verdict for plaintiff, saying, if she "used ordinary care in the selection of a reasonably competent surgeon \* \* \* then I charge you that the defendant would be liable for the condition produced by reason of said ovaries being removed, notwithstanding some other course pursued by the surgeon might have saved the removal of her ovaries." (Record, p. 46).

The effect of this charge is to say if any one is slightly injured on your train by "shock or concussion" and thereafter a remote injury arises not in the mind of the railroad not contemplated and could not be anticipated, surgeons called in, not by the railroad but by plaintiff alone, who says they were curing her and no operation needed, but suddenly finds one to say her hip is dislocated and she will never get well, hunts others and finds one who without consultation with the first, without treatment to cure, performs a dangerous operation in which the railroad is **not invited to participate**, the railroad must pay for it, **though the patient would have recovered without it and it was not necessary at all**. This is carrying the doctrine far beyond good logic. This is a fundamental error. We had the right **as a matter of law** to have jury pass upon our defense to say even though she received injuries from the collision, still her ovaries were not permanently injured and that the operation was unnecessary and that plaintiff would have recovered without the operation and that she did not take ordinary care of herself and continue a course of treatment, begun for her, that would have cured and saved her this unusual operation generally condemned by the medical profession.

The effect of the Court's ruling, first, that where a passenger is slightly injured, and subsequently a condition, as a remote cause, has set in through the intervention of a new casualty, and the party is persuaded, advised to and submits to an operation by a surgeon of her own selection, antagonistic to the railway and performs an operation wholly unnecessary, bringing on a new and independent complication, the railway is liable notwithstanding the operation was wholly unnecessary and ought not to have been performed. No such theory should be put in practice and find a place in the books arising under any principle of law known to us. If the injury were shown to be, as it was not, the direct and proximate cause, it might be something in it.



You may as well say because a passenger has an injury to his toe, and subsequently he calls in a surgeon who foolishly, ignorantly and wantonly amputates his leg, as a remote intervening cause, the railroad would be liable when it was not necessary and the party would have gotten well and saved his toe by proper treatment.

### EXCESSIVE VERDICT

We are entirely familiar with the decisions of the Federal Court that the Appellate Court will not generally disturb a verdict for being excessive, or pass upon the action of the trial Court in refusing to grant a continuance or a new trial. The Texas Statute upon those questions are mandatory upon the trial Court and Appellate Courts, and if the Federal Court is to follow the State procedure and practice, it should be done in these cases as well as any other.

In regard to an excessive verdict. In this case we have the affidavits of jurors who say they were influenced in their verdict by the conduct of Dr. Dale more than anything else.

Can any case for the consideration of the Appellate Court be more satisfying, that an injustice has been done, and the Court exercised an arbitrary discretion in not granting a new trial? We think not.

We regard this as a case where a juror may make a statement. The Texas Statute, Art. 2021, expressly provides that the Court may hear evidence of the misconduct of the jury—of any communication to the jury and in the discretion of the Court grant a new trial. While the Texas Statute as a matter of procedure would not probably control the Federal Court, yet it ought to have been persuasive.

There is always a way to be found to remedy a wrong. If

the Federal Court shall follow the State practice in regard to granting new trials, where there was some irregularity in the jury room, such as is shown, then the Texas Statute provides the procedure. The Texas Statute on the question of misconduct is as follows:

"Art. 2021. (1371) (1369) Misconduct of jury, etc., as ground of motion; evidence. Where the ground of the motion is misconduct of the jury or of the officer in charge of same, or because of any communication made to the jury, or because the jury received other testimony, the Court shall hear evidence thereof; and it shall be competent to probe such facts by the jurors or others, by examination in open Court; and, if the misconduct proven, or the testimony received, or the communication made, be material, a new trial may, in the discretion of the Court, be granted."

The jurors have stated, **more than anything else, they were influenced by Dr. Dale's alleged misconduct.** The affidavits show Dr. Dale to be a man of high character, above any misconduct. The action of Mr. Thomas and his legal (?) reply, to say the least, is **peculiar.**

The affidavit of the nurses, and this daily report contradicts the plaintiff in every particular. Therefore the Judge used his discretion in **every** particular, arbitrarily, **against the defendant.**

#### PROPOSITION OF LAW

Where a verdict is excessive, it is the duty of the trial Court to reverse the case, especially if it is so excessive, as to indicate passion or prejudice, as in the case here and admitted by the jurors, but if not reversed, then it is the duty of the Court to require a remittitur.

Tex. Rev. Civ. Statutes 1911, Arts. 1631-2021.

Felton vs. Spire, 79 Fed., 576.

Railway Co. vs. Lowrey, 74 Fed. Rep., 463.

Farar vs. Wheeler, 145 Fed. Rep., 483.

Felt vs. Puget Sound Rly., 175 Fed., 477.

Duke vs. St. Louis Rly., 172 Fed., 686.

The Felton case is an opinion of Judge Taft, in which he discusses the duty of the trial court in relation to a motion for a new trial. On page 582, this language is used:

"We come, then, to the question whether a Federal Court, in which a jury had rendered a verdict, has power to set aside a verdict, when, in its opinion, it is contrary to the decided or overwhelming weight of the evidence, and in the exercise of legal discretion may properly do so. Upon this point, we have not the slightest doubt. This Court in *Railway vs. Lowery*, 74 Federal, 463 has already decided it. In an elaborate and most carefully considered opinion, Judge Lurton, speaking for the Court, points out the distinction between that insufficiency in law of evidence to support an issue which will justify a peremptory instruction by the Court, and that insufficiency in law of evidence, when weighed with opposing evidence, which, while not permitting a peremptory instruction, will justify a Court in setting aside a verdict based on it, and in sending the parties to another trial before another jury. It is apparent, from the foregoing, that the view of the learned Judge at the circuit, expressed in the opinion of motion for a new trial, that because the Court cannot direct a verdict one way, it may not set aside a verdict the other way as against the weight of the evidence, is erroneous. Indeed, as distinctly pointed out by Judge Lurton, the mental process in deciding a motion to direct a verdict is very different from that used in deciding a motion to set aside a verdict as against the weight of evidence. In the former,

there is no weighing of plaintiff's evidence with the defendant's. It is only an examination into the sufficiency of plaintiff's evidence to support a burden, ignoring defendant's evidence. In the latter, it is always a comparison of opposing proofs."

In the case of *Duke*, Judge Rogers goes fully into the principles that should govern a Federal Court in the determination of a motion for a new trial. In it a quotation is made from the Supreme Court of the United States in the case of *Railway Company vs. Winter*, 143, U. S., 60, in which it is stated that it is the province of the trial court to determine upon a motion for a new trial whether a verdict is excessive. A verdict of \$17,500.00 in favor of the family of a man twenty-nine years of age, a brakeman and father of a family was reduced to \$6,000.00.

In the case of *Felt*, wherein the deceased was a stone mason, 47 years of age, with ability to earn from \$6.00 to \$6.50 per day, a verdict of \$10,000.00 was reduced to \$6,000.00.

Under the Texas law now in force, it is made the duty of the Appellate Court to reduce the verdict when believed to be excessive. Rev. Civ. Stats., Art. 1631. That is exclusive of the question of where the jury was improperly influenced which calls for an additional ground to cut down. The Statute is as follows:

"Art. 1631. Suggestion of remittitur. In all civil cases, now pending, or that may hereafter be appealed to any Court of Civil Appeals of this State, and such shall be of the opinion that the verdict and judgment of the trial Court is excessive, and for that reason only, said cause should be reversed, then it shall be the duty of such Court of Civil Appeals to indicate to the party in whose favor such judgment was rendered, or his attorneys of record, the amount of the excess of such verdict and judgment; and said Court shall, at the same time,

indicate to such party, or his attorney, within what time he may file a remittitur of such excess, and if such remittitur shall be so filed, then the Court shall reform and affirm such judgment in accordance therewith; if not filed as indicated, then to be reversed. (Acts 1893, p. 89; see Sayles' Practice, p. 653; T. & N. O. Ry. vs. Syfan, 44 S. W., 1064; G. H. & S. A. Ry. vs. Hynes, 50 S. W., 624; G. H. & S. A. Ry. vs. Nicholson, 57 S. W., 694; Ry. vs. Linthicum, 77 S. W., 40; Ry. vs. Stevens, 94 S. W., 395; New York Life Ins. Co. vs. Herbert, 106 S. W., 421; Southwestern Telegraph & Telephone Co. vs. Gehring, 137 S. W., 754; Texas & N. O. R. Co. vs. Marshall, 140 S. W., 508)."

On the question of new trial and remittitur on account of amount of damages, see Art. 2022, as follows:

"Art. 2022. New trials granted where damages too small etc. New trials may be granted as well when the damages are manifestly too small as when they are too large. (Id., Sec. 111; P. D., 1472; see Sayles' Practice, pp. 632-644; Burns vs. Mer. & Plan. Oil Co., 63 S. W., 1061)."

In the case of Burdict vs. Miss. Pac. R. Co., Book 26, L. R. A., 385, is an interesting discussion with full annotations showing amounts allowed and amounts remitted.

In the case of Van Vranken vs. Kansas City Elevated Railway Company, reported in 114 Pac. Rep., p. 202, in an opinion handed down by the Supreme Court of Kansas, it was held that while a verdict for **\$10,933.00** was large, that it was not so excessive as to show passion and prejudice.

In this case the injuries were very similar to those claimed in the case at bar. A young woman twenty-three years of age was

injured by being thrown from a street car which was negligently brought to a sudden stop. The Court in its opinion says:

"The plaintiff testified that she had never had treatment from a doctor for anything nor had anything the matter with her that she knew of before the accident. Soon after the accident, she was taken to a hospital, where a median line incision was made in the abdomen, the right ovary and the appendix removed, and the left ovary was resected—i. e. a piece removed and a piece left. A hemorrhage into the right ovary was discovered and the appendix was slightly congested and the left ovary was incysted. She was at the hospital three weeks, had pain and suffering after the operation, and testified that she had been in a very nervous state and unable to work except a short time; that she would then break down. She testified that she could not stand being on her feet any length of time; that she suffered a great deal across her abdomen, and is compelled almost every week to go to bed a day or two; was continually in a nervous state; had always to be careful in getting home ahead of the crowd on the car so that she could get a seat; would faint if she stood up, \* \* \* had not been able to work except a short time, then she would break down; that she had tried bookkeeping and broke down under the nervous strain, and had to go to the country. \* \* \* The surgeon testified, among other things, that a cystic condition of the ovaries occurs frequently without any accident, and that he would not attribute it in this case to the accident, but that the hemorrhage seldom follows anything except some force or violence. The jury returned a verdict for \$10,933.00. The railway company appeals and claims that the liability was not established by the evidence and that the verdict was excessive."

The Court says:

"That the verdict was large is beyond dispute. That it was so excessive as to show **passion and prejudice** the appellant **does not claim** and we are referred to no authorities for so holding. It is hard to measure the injury and still harder to estimate it in dollars and cents, and, in the absence of any showing of misconduct indicating passion or prejudice, we must leave the matter as determined by the jury who saw the appellee and heard her testify."

In the case of San Antonio Traction Company vs. Corley, the Court of Civil Appeals at San Antonio, in an opinion handed down February 13th, 1913, 154 S. W., 621, held that a verdict for **\$12,500.00** was not excessive. In this case Mrs. Corley was left in the same condition, in-so-far as being unsexed is concerned, as was Miss Hill. In discussing the extent of the injuries and whether or not the verdict was excessive, the Court says:

"The evidence shows that at the time she was injured she was in good health; that she was able to do, and did, all the household work, including washing and ironing. The injuries were serious, necessitating staying in bed for about three months, and requiring a painful operation to be performed and were of such character that, according to Mrs. Corley's testimony, she had continually suffered pain up to the time of the trial, besides being very nervous and afflicted with headache and rushing of blood to the head, and an injury to her left eye; that she was unable to do her work on account of the pain in her side, and her side was swollen all the time. The operation was necessary, and involved the removal of her remaining ovary; the other having been removed about 18 months before she was injured. Dr. Kenny testified, in part: 'The removal of this ovary, after the removal of the other, would bring on menopause, produce sterility, bring on a change of life.' It is not considered necessary to set out all the evidence relating to the injuries. Suffice it to say,

that we have considered the same carefully, and, while the amount allowed is large, the injuries are such that reasonable minds might differ widely regarding the proper amount of damages to compensate for same; and we do not find that the amount awarded is so disproportionate to the injuries as to lead to the conclusion that passion or prejudice or other improper motive actuated the jury in awarding the same."

In the case of Southwestern Telegraph and Telephone Company vs. Davis, 156 S. W., 1147, the jury rendered a verdict in favor of plaintiff for **\$1,250.00**. The plaintiff in this case was shocked by lightning entering her home over the wire of the telephone company and the company was charged with negligence for not having a telephone equipped with a lightning arrester. The plaintiff alleged and proved:

"That said shock as aforesaid caused his wife to suffer a rupture of a cystic tumor on one of her ovaries, and thereby causing the Fallopian tubes and uterus to become inflamed and diseased. That after suffering for a period of about six weeks, being constantly under the treatment of her family physician, she was compelled to be taken to Texarkana and there operated on and have her ovary and uterus removed. That thereby she suffered great pain and mental anguish, remaining for some time in the hospital at Texarkana, and has since suffered and continues to suffer great pain and suffering. That as a result of said operation of removing her ovary and uterus plaintiff's wife has been rendered permanently incapable of producing children, to her great sorrow and distress of mind."

It will be seen that in the above three cases the largest verdict that has been rendered is for **TWELVE THOUSAND FIVE HUNDRED DOLLARS (\$12,500.00)**. That in the Corley case the plaintiff was led, by an operation, in the same condition



as was the plaintiff in the case at bar. That in the Van Vranken case practically the same operation was performed as was performed on Miss Hill. That in the Davis case one ovary and the uterus were removed, while in the case at bar Miss Hill lost both ovaries and uterus was not removed.

Here are some additional cases cited in a note to Ruck vs. Milwaukee Brew. Co., 148 Wis., 222; 134 N. W., 914; Am. Ann. Cases, 1913, A., p. 1356.

As a matter of convenience for the Court, we quote them as follows:

"Injuries Peculiar to Women.

The following verdicts for injuries peculiar to women have been sustained as not excessive:

\$10,933—Van Vrankin vs. Kansas City El. R. Co., 84 Kan., 287, 114 Pac., 202. (Stenographer; age twenty-three; earning \$8 per week; thrown violently from car; appendix, right ovary and part of left ovary removed; health seriously impaired).

\$10,275—Stauffer vs. Metropolitan St. R. Co. (Mo) 147 S. W., 1032.

\$10,200—North German Lloyd Steamship Co. vs. Roehl, (Tex) 144 S. W., 322 (deplorable physical condition).

\$7,541.75—Southern Pac. Co. vs. Blake (Tex) 128 S. W., 668 (passenger; injured in derailment of train; displacement of womb; injured in side and hip; confined to room three months).

\$5,000—Karczenska vs. Chicago, 114 Ill., App. 516; 239 Ill., 483; 88 N. E., 188.

\$2,500—St. Louis, etc., R. Co. vs. Hartung, 95 Ark., 220; 128 S. W., 1025.

\$1,500—Radcliffe vs. Lewiston (Me.) 84 Atl., 639.

\$1,000—Godsall vs. Joliet, 150 Ill. App., 519.

Palmer Transfer Co. vs. Long, 140 Ky., 111; 130 S. W., 961.

Lang vs. Hill, 157 Mo. App., 685; 138 S. W., 698.

\$500—Shinn Glove Co. vs. Sanders, 147 Ky., 349; 144 S. W., 11 (suppressed menstruation); McGee vs. Vanover, 148 Ky., 737; 147 S. W., 742 (miscarriage).

The following verdicts for injuries peculiar to women have been declared excessive:

\$10,475—McCabe vs. Butte (Mont.) 125 Pac., 133 (married; middle age; bruised from fall on sidewalk; several miscarriages; expenditures, \$475; reduced to \$3,000).

\$10,000—Norris vs. St. Louis, etc., R. C., 239 Mo., 695; 144 S. W., 783 (unmarried saleswoman; injury to womb; verdict reduced to \$7,500).

\$7,500—Kirby vs. St. Louis, etc., R. Co., (Mo.) 130 S. W., 69 (age forty-three; thrown down in boarding street car; injuries to back, knee and ankle; in bed two months; at time of trial, nine months after accident, ankle not recovered and womb injured; verdict reduced to \$4,000).

\$7,125—Louisville R. Co. vs. Wellington, 137 Ky., 719; 126 S. W., 370; reversed on other grounds; 137 Ky., 726; 128 S. W., 1077 (passenger assaulted by disorderly negro passenger; hemorrhages of sexual organs at other than menstrual period).

Our contention is that the jury were prejudiced, and the size of the verdict shows the result of prejudice.

### PROPOSITION OF LAW

Eighteenth Assignment of Error. Rec., p. 368

The Circuit Court of Appeals erred in not reviewing said cause by, or with a written opinion.

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This is a suit of sufficient magnitude to deserve a written opinion, and it was error in the Court of Appeals to pass it by summarily without any written opinion or any sufficient reason to justify such summary disposition of the case.

This case, in our opinion, is one that should be reversed. We feel that the evidence does not sustain the verdict, and the District Court erred in not setting it aside or reversing it.

It is a little singular she was the only person, only woman, who sustained one of those injuries her doctor did not discover until the lines had been lain for damages, then a new doctor made the discovery.

This Company is not fighting for delay but for principle. It deserved an answer to its contention from the Appellate Court, which, at least, would have had the effect to strip it of much matter, but it is compelled to insist upon now, as though brought before this Honorable Court in the first instance.

No opinion setting out reasons to be challenged, in this Court except in the general way as though the case had never been in an Appellate Court.

Sec. 128 of the Act Creating the Circuit Court of Appeals, Hopkins Judicial Code, p. 143, which provides:

"The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts."

The decision in this did not **review**, but merely adopted, so to speak, the judgment of the District Court, unless such action may be designated a review.

We do not believe the Court would have affirmed the case if time and care had been taken to examine the record, such as it would require to write an opinion, and we feel confident in the assertion that on account of the errors committed no opinion in writing will ever be given affirming this case.

We regret the great length of this brief, but believing quoting quite fully from the testimony will save the Court and counsel some labor, and to some extent, avoid the necessity of examining the record—except when required.

We do not see how it could well have been less prolix and brief, except it would be at the expense of getting our cases fully before the Court.

We insist, on account of the many errors committed, this case should be reversed with instruction for another trial.

Respectfully submitted,

*George Thompson,*  
*T. D. Calts, Jr.*

Attorneys for Petitioners.

NO. 482.

IN THE

# Supreme Court of the United States

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TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error.

vs.

CLARA HILL, Defendant in Error.

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ANSWER OF PETITIONER TO DEFENDANT IN ERROR'S  
MOTION TO AFFIRM OR DISMISS.

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By making this reply we do not waive the right to have this case take its regular order of submission, or our brief on file.

We will make this short reply to the brief of Defendant in Error, insisting, however, that this case shall not be considered except that it be reached on regular assignment when we may be heard in an oral argument, which we regard in this case to be necessary. We do not in this short reply discuss the case fully, but rely upon our brief for that in connection with this.

## FIRST POINT OF LAW.

(Assignment of Error No. 1.)

In reply to Defendant in Error's position and contention, we beg to show to the Court that the suit was originally instituted in Frio County and that the Texas & Pacific Railway filed no pleading until the case reached the United States District Court, when Defendant pleaded and adopted the answer of the International and Great Northern Railway Company, which Company pleaded, among other things, "if said suit is based upon the act approved March 13th, 1905, 29th Legislature, pages 29 and 30, then this Defendant says that said act of the Legislature had no application to cases of this kind and said act is void and inoperative for said purpose, or any other purpose as fixing or attempting to fix the venue of suit for injuries done to passengers by a foreign road. That said act does not clearly express in its caption such purpose and the word passengers only occurs in the caption where the damages 'of the transportation or contract in relation to the carriage of passengers or freight, baggage or other property et cetera,' and the word passenger only occurs in the body of the act in the fourth word of the first line, and never thereafter occurring in the body of said act, and said law is therefore void and of no force or effect either as an original act or as an amended act, since the same did not comply with the provisions of the law and the constitution as contained in Article 3 thereof, and the sections of said article prescribing and setting forth the manner in which original bills should be proposed and introduced, and the amendments of any law. Said act is in conflict if construed to fix venue in Frio County with Act 1901, p. 31." (Record, page 9.)

The answer of the Texas & Pacific Railway Company on the jurisdictional question is as follows:

"Now comes the Defendant, The Texas & Pacific Rail-

way Company, upon whose application joined in by the other Defendant, this cause was removed from the District Court of Frio County, Texas, to this Honorable Court, and respectfully alleges that in case the plea in abatement heretofore filed by the other Defendant herein be sustained, that thereupon this Defendant desires to and here now shows to the Court that it had no agent or representative in Frio County, Texas, when this cause of action accrued, nor when this suit was filed, and that its line of railway runs from Texarkana, via Marshall, Dallas, Fort Worth, Abilene, Big Springs on to El Paso, Texas, several hundred miles north of Frio County and that no part of its line traverses Frio County and that the action is alleged and the personal injury occasioned to have occurred in Cass County, Texas."

and further denies partnership. (Record, pages 18-19.)

It is not meeting the question as Defendant in Error has attempted to do by saying the plea of the Texas & Pacific Railway was conditional upon its being sustained on behalf of the International & Great Northern Railway Company. Even if that view should be taken, then the plea is available because the Court did in effect sustain the pleading and defense of the I. & G. N. Ry. Co. and dismiss it from the suit, **which at once revived the pleading of the Texas & Pacific**, if ever dormant, and was revived simultaneously by the ruling of the Court in dismissing the I. & G. N. Railway Co. from the cause, which was tantamount to sustaining the plea. Our contention is that the United States Circuit Court of Appeals was a Court of contemporaneous jurisdiction with that of the State Court and it had the same power of the State Court to pass upon the pleas of abatement as the State Court had. That the removal of the case from the State Court to the Federal Court was simply to give it a standing in the Federal Court and therefore all questions that could have been raised in the State Court were equally available in the Federal Court if timely presented, which was done in this case. Under the Texas statutes where a plea of

privilege is filed it does not dismiss the case but the case is ordered to be transferred to the proper county. See Revised Civil Statutes of Texas, to-wit:

Art. 1833. Whenever a plea of privilege to the venue, to be sued in some other county than the county in which the suit is pending, shall be sustained, the Court shall order the venue to be changed to the proper Court of the county having jurisdiction of the parties and the cause; and the clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the Court, and transmit the same, with the original papers in the cause, to the clerk of the Court to which the venue has been changed; provided, that nothing herein shall prevent an appeal from the judgment of the Court sustaining a plea of privilege. (Id.; *Stevens v. Polk County*, 123 S. W. 618; *Harris Millinery Co. v. Bryan*, 125 S. W. 999; *Moorhouse v. King Land & Cattle Co.*, 139 S. W. 883.)

There is no such provision in the Federal law. For instance, El Paso is in a division of the Western Division of Texas and part of the Texas & Pacific Railroad lines run through that county and if suit had been brought in that division of the district it would probably have been removable to the Western District because the conditions of jurisdiction would be presented. El Paso was not the domicile of the Texas & Pacific and it had no line of railway nor local agent in Frio County; its domicile was in Dallas County, Texas. Now, this Court could not transfer the case to either place, but the case being dismissed without prejudice, the Plaintiff would be left to her remedy to sue in the county where she was hurt in the Northern District of Texas, or in Dallas, Texas. The presumption is that she was living in Queen City, the home of her parents, being a single woman.

If, as stated by Defendant in Error, the removal of the case by the Plaintiff in Error invoked the jurisdiction of the Court to hear and determine the cause, it did indeed invoke its jurisdiction to pass upon the same questions of venue that the State



Court could pass on, preliminary to any trial. In other words, because a case is removed from the State Court where the Defendant filed no answer, the Defendant must be held to waive further irregularity existing prior to such removal involving pleas to the jurisdiction of the Court, pleas of privilege, etc. Such was never intended. The Federal Court could determine just as a State Court could, for it is the question raised here whether or not the suit was properly brought in Frio County, involving no question of removal which would estop a Plaintiff, and the two propositions are not analogous. The cases cited by counsel, as we understand it, involves the question as to when a party removes the case to the Federal Court that it could not be dismissed upon a motion to remand. In other words, the Texas & Pacific removed the case to the Federal Court and having done so **it could not move to remand** the effect of which would be to **return** to Frio County, but it could do so by pleading in abatement any plea it could below with like effect. We believe the Court will conclude, that Defendant in Error's statement is not a fair statement of the facts below.

We have fully discussed this question in our brief, to which we refer under the foregoing heading.

## SECOND POINT OF LAW.

(Assignment of Error No. 2.)

We come now to the question of **excluding** jurors of high character because they have prejudice against **FAKE CASES**.

We insist in reply to contention of Defendant in Error that it was error in the Court to excuse competent jurors who had the requisite qualifications because of their prejudice against the class of faker litigants, the injury being shown by the action of the jury. Of course, in the Court's qualification and in the stenographer's certificate there is a statement that he did not

take all of the testimony. All of the testimony of Mr. Vance was not taken because the stenographer was not there. When he was called in Vance again testified to practically the same thing that he did before the stenographer got there, but he did take down every word of the testimony of Mr. Lentz and counsel knowing that fact ought not to make the statement that is made. The size of this verdict and the facts contained in the motion for new trial and the attack upon Dr. Dale's testimony before the jury, and the refusal of the Court to postpone it to give us an opportunity to be heard all show and tend to show the prejudice of the jury and that we did not get a fair trial, which we might have gotten if we had had Mr. Vance or Lentz, entirely different class of men. Counsel say the conduct of Mr. Thomas was perfectly proper; even the jurors did not think that, as some of them stated they did not consider certain data he had prepared on the outside to use on the jury. His qualification was a little remarkable as it has the sound of a lawyer's master hand, and he is a jeweler and not a lawyer. The affidavits made on the motion for new trial were entirely in accordance with the law and practice governing such cases in Texas and should have been filed and considered.

### THIRD POINT OF LAW.

There is one thing we have never understood concerning the qualification of the Court to Bill No. 3, about which the Defendant in Error have so much to say in their brief on page 21, et seqr. The Court is made to say by its qualification of the Bill that the Court was not called upon to rule upon an application to postpone, which is directly in the face of the Record, which was made on the 15th day of May, 1913, which is as follows:

"Now on this day came on to be heard before the Court, the motion of the Defendant, the Texas & Pacific Railway

Company, to continue this cause for the term or to postpone the same to a later date of the present term for the reasons stated at length in said motion, and the same having been heard by the Court, and duly considered, it is the opinion of the Court that the said motion should be in all things overruled, and it is accordingly so ordered, to which ruling of the Court, the Defendant, Texas & Pacific Railway Company, in open Court excepted." (Record, p. 44.)

This order was written under the direction of the Court, or by the Clerk of the Court. We do not know who wrote it. We did not, and it expressly shows it was presented to the Court and the reasons for the application were presented at length therein, and referred to in paragraph XI of the motion for new trial, Record, pps. 71-72-73, and earnestly urged by us, which was filed June 12, 1913, and had been on record a long, long time before the Court made the qualification to this bill months afterward, to-wit, October 14th, 1913, and no single lisp of the Court or any one, that it was not presented to the Court until long afterwards when it appeared in the bill of exception months after.

#### FOURTH POINT OF LAW.

The only comment we make under this in reply to Defendant in Error's criticisms is to say that the charge referred to should be proximate **result** instead of proximate "cause," simply a clerical error too plain to be misunderstood or to be argued about before this High and Honorable Tribunal.

#### SEVENTH POINT OF LAW.

We think the seventh point of law presents a plain error, obviously so, and we can add very little to what we have already said on that subject. We wish, however, to put the question in

a more concrete form, that is to say it was error of the Court not to submit to the jury the question as to whether or not under the circumstances Clara Hill was guilty of contributory negligence in discharging doctors who were curing her, get on the train and travel to a remote part of the State, allow herself to be operated on by a doctor who had not treated her as Dr. Dale had.

The misconception of the Defendant in Error, in our opinion, as will be seen from the decision he relies on, arises and grows out of the fact that when a party is injured and seeks the advice of a doctor and follows his advice that she should not be responsible for any mistake of the doctor in performing an operation that was originally caused by the act of the railroad. It was a question of fact in this case as to whether or not she received such injury, or made it necessary for her to be operated on and to whether or not she would have gotten well without the operation if she had continued the proper treatment which had been administered to her. The Court eliminated all questions of our defense by its charge and held that railroad **would be responsible whether she would have gotten well or not by any other treatment.**

The further reason of such rule is, to charge the party who is to suffer the operation, with ordinary care, not alone in selecting a surgeon to operate, but in exercising ordinary care in dismissing competent surgeons who were curing her to undergo a needless operation. The testimony of the Plaintiff in Error, Defendant, showed that she was not seriously injured; that no operation was necessary; that she was a neuresthenic and getting well. This was a sharp issue and the Court practically instructed the jury to find for the Plaintiff **for it did not make any difference whether she would get well or not.** Such a charge does not seem to be the part of logic or the enunciation of a correct legal principle, but arises more from a sympathetic nature and

the desire to give the whole benefit of any possible doubt to the poor girl, and therefore announced an unhealthy and unwise doctrine. Surely the railroad ought to have had the benefit of this issue before the jury.

#### ELEVENTH POINT OF LAW.

In replying to the Defendant in Error's argument we must insist that the law is not settled against our contention that the Appellate Court will not review the discretion of the Trial Court in refusing to grant a motion for new trial on the ground that the verdict is excessive.

The Defendant in Error says they are so confident they will not pursue this subject further. We insist that such is not the decisions of the Appellate Courts, as shown in the opinions of Mr. Taft on the subject and the authorities cited by us in our brief. We would be glad for this Court to read the opinion of Judge Taft in *Felton vs. Spire*, 79 Fed. Rep. 576. He says: "It is apparent from the foregoing that the view of the learned Judge at the Circuit expressed in the opinion on motion for a new trial that because the Court cannot direct a verdict one way it may not set aside the verdict the other way as against the weight of evidence as enormous." We refer you to pages 115 and 116 of our argument for the Texas Statute. **It is mandatory** on the part of the judge to set aside and to enter a remittitur where the judgment is excessive or require a new trial. The Courts for many years threw themselves behind the jury to escape the responsibility of remitting a judgment where it is excessive. The law comes in and says you shall remit if it is excessive and if the party is not willing to stand by a remittitur then you shall give a new trial. It is a plain error for the Court not to enter a remittitur in an excessive judgment, such as this is, and in the manner in which the jury themselves say it was given. So then, if the Federal Court will follow the

State practice it will hear the testimony and examine the affidavits of jurors as provided by Article 2021, Revised Statutes, as shown on page 113 of our brief. In this case affidavits were presented in connection with the motion for a new trial and considered by the Court below who hesitated a long time as to whether he would grant a new trial or remit the judgment, and finally ruled against us. If the Federal Court ignores the Texas Statute and the Texas practice and does not follow the State procedure, it is tantamount to saying that in the State Court one rule of law and procedure prevails in which the litigant has the right to invoke the powers of the State to secure, but when the case is transferred from the State Court to the Federal Court, having the same jurisdiction concurrently with the State Court to try the issues, the Federal procedure is such as to deny to the litigant a favorable right under the law of the land.

The United States Circuit Court of Appeals have expressed no opinion in writing in this case on this subject and therefore we have to assume that they overruled every contention made by us and overruled the question of going into the excessiveness of the verdict for the reasons given by the Court recently decided on the 9th day of December, 1914, in the case of J. T. Bigger et al vs. Railway, in which the Court says:

"We find none of the assignments of error in this case well taken. With regard to excessive damages see Alpha Portland Cement Co. v. Curzi, 211 F. 580-587, and cases there cited.

"The judgment of the District Court is AFFIRMED."

This case is on appeal also to this Honorable Court and involving some of the same questions involved in this case. Clearly the Court of Appeals thought that the verdict was excessive and felt it could not go into these questions, which we regard as a plain error of law.

We have not here undertaken to discuss all the errors assigned

in our brief for they are urged and insisted upon, but only enough to show this case should not be disposed of on Defendant in Error's motion, for this is no frivolous appeal nor made for delay. Your petitioner does not believe this case was fairly tried, as is shown by the awful judgment. If this Honorable Court grants the motion and proceeds to dispose of the case, without oral argument, we presume the Court will consider our printed brief on file herein, which we specially urge.

Respectfully submitted,

GEO. THOMPSON,

T. D. COBBS, of Cobbs, Eskridge & Cobbs,  
Attorneys for Petitioner.



TEXAS & PACIFIC RAILWAY COMPANY *v.* HILL.ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH  
CIRCUIT.

No. 482. Submitted March 1, 1915.—Decided April 12, 1915.

A corporation created by an act of Congress is inherently entitled to invoke the jurisdiction of this court to review a judgment of the Circuit Court of Appeals, even though such judgment would be final as against another defendant not so incorporated.

Nothing in the record indicates that the trial court erred in not taking the case from the jury.

Where the defendant after removing the case into the Federal court, obtains a continuance in order to prepare its defense on the merits, and does plead to the merits, such action amounts to a waiver of objections to the jurisdiction of the state court in which the action was originally commenced.

The exclusion of jurors and the granting or refusal of postponements are matters within the discretion of the trial court and this court will not interfere unless it appears that the limits of sound discretion were transcended.

Objections to the charge of the trial court to the jury in this case *held* unfounded.

Whether the trial court erred in refusing a remittitur because of the excessive amount of the verdict is not open in this court. *Southern Ry. v. Bennett*, 233 U. S. 80.

THE facts, which involve the validity of a judgment for damages for personal injuries, are stated in the opinion.

*Mr. H. C. Carter, Mr. Magus Smith and Mr. Perry J. Lewis* for defendant in error in support of the motion.

*Mr. George Thompson and Mr. T. D. Cobbs* for plaintiff in error in opposition to the motion.



MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

As a corporation created by an act of Congress the plaintiff in error is inherently entitled to invoke our jurisdiction. Hence the motion to dismiss is without merit.

Both the record and the argument for reversal are voluminous, the latter covering about one hundred and thirty-five printed pages. We state some of the undisputed facts out of which the controversy arose and recapitulate such of the propositions relied on in argument as we think need to be considered to make clear our disposition of the case.

On December 22, 1911, while a passenger on a train of the Texas & Pacific Railway moving between Longview and Atlanta, Texas, a collision between two trains of the road took place which, it was alleged, occasioned the injuries to the defendant in error to compensate for which she brought this suit. She was travelling on a through ticket sold by the International & Great Northern Railway Company at Pearsall, Frio County, Texas, where the defendant in error resided and where she was employed as a clerk. The ticket covered a journey to Longview, where the International connected with the Texas & Pacific, and thence by that road to Atlanta. After the collision the defendant in error went to the home of her parents at Queen City near Atlanta, where she was treated by a local physician. Under his advice she went to a sanitarium at Texarkana. From there she returned to Queen City, remained under treatment a while and went to her home at Pearsall. Under the advice of a local physician and accompanied by him she subsequently went to San Antonio for consultation with surgeons there. They advised an operation but the advice was not immediately followed, as the defendant in error returned to Pearsall and remained there some time under the care of her physician.

Not improving, again under his advice and accompanied by him she went to San Antonio, submitted to an operation and after convalescence returned in an invalid condition to Pearsall where she was living at the time this suit was commenced on August 24, 1912, in the District Court of Frio County, Texas, against both the International and the Texas & Pacific, the liability of both being based on an allegation that they were partners. The International pleaded to the jurisdiction on the ground that although it operated a road and had an agent in Frio County, it was not susceptible of being sued there for an alleged injury to a passenger. It was asserted that if the jurisdiction was based on a law of Texas of 1905 which was referred to, it did not apply, and if it did, the law was void because repugnant to the state constitution for reasons which were named. In addition in the same paper a denial of the alleged partnership was made and the exclusive liability of the Texas & Pacific for the injury, if any injury had resulted, was asserted. On the same day the Texas & Pacific as a corporation created by an act of Congress, joined by the International, prayed and was granted the right to remove the cause to the District Court of the United States for the Western District of Texas and consequently filed the record in that court on the fourteenth of October, 1912. On the same day the Texas & Pacific filed a paper styled in its heading "Answer of Defendant," but on which was endorsed the title of the case and the words "Pleas, Demurrer, and Answer of the Defendant, T. & P. Ry. Co." The paper contained four separate paragraphs each signed by the attorney. The first, after referring to the plea to the jurisdiction of the state court filed in that court by the International and after alleging that the Texas & Pacific had no road and did no business in Frio County, asked that if the plea of the International should be sustained, the suit should abate as to the Texas & Pacific. The second paragraph

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denied under oath the alleged partnership with the International. The third virtually demurred on the ground of no cause of action, and the fourth was an answer to the merits generally denying the averments of the petition and setting up particular grounds of defense. On the third of January, 1913, the plaintiff moved to remand to the state court which was resisted in writing by the Texas & Pacific in a paper in which it alleged that although it was an inhabitant of the Northern District of Texas it had the right to remove the cause to the District Court of the Western District. This pleading contained no reservation whatever of any question of jurisdiction of the state court, but on the contrary alleged that the removal was valid, had been joined in by the International and that said road "joins in this motion contending that the case is one under the law removable, and which controversy between the parties this court has the sole and exclusive jurisdiction by virtue of the removal therein." The motion to remand was denied. The case being at issue, and a term at which it could be tried having either commenced or being about to commence, the Texas & Pacific made a written application for a continuance to enable it to prepare its defense on the merits. The application was granted. Subsequently both the defendants in somewhat amplified form reiterated the pleadings previously filed by them except that the answer of the Texas & Pacific contained averments disputing the existence of the injury complained of, the necessity of the operation to which the plaintiff had submitted, the skill of the surgeon by whom it was performed and attacking the good faith of the plaintiff on the ground that she was feigning an injury not suffered for the purpose of recovering from the railroad damages to which she was not entitled.

When the case was called for trial on May 13, 1913, the defendants directed the court's attention to the alleged pleas in abatement concerning the jurisdiction of the

state court and asked a ruling on the same. The court thereupon overruled said pleas on the ground that the parties had waived them by voluntarily submitting themselves to the jurisdiction of the court. In signing the bill of exceptions on this subject the court said:

"The suit in this cause was filed jointly against the International & Great Northern Railway Company and the Texas & Pacific Railway Company in the District Court of Frio County, Texas; the International & Great Northern Railway Company joined the Texas & Pacific Railway Company in an application to remove the cause from said state court to this Court; the record in said cause was filed in this Court for the December term, 1912; at said term of this Court both defendants made a general appearance without reservation and pleaded to the merits of the cause. The plaintiff made a motion to remand the cause to the state court. In reply to the motion to remand, which was heard at the December term of this Court, defendants filed a written statement to the effect that this Court had sole jurisdiction to try the case. After the motion to remand to the state court was overruled at the December term, defendants made an application in writing for a continuance upon the ground that certain witnesses were necessary for a proper defense on the merits of the case. This motion was granted, and the cause continued to the May term, 1913. When the cause was again called for trial at the May term, 1913, defendants for the first time offered the pleas in abatement mentioned in the bill and the pleas were overruled. A reference to the pleas will show that the defendant, Texas & Pacific Railway Company, only insisted upon its plea in abatement in event the plea in abatement offered by the International & Great Northern Railway Company, was granted."

During the trial when the physician in charge of the sanitarium at Texarkana was testifying as a witness for the defendants, he was asked on cross-examination as to

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the truth of statements that there had been improper or indelicate actions or conduct on his part towards the plaintiff while she was under his treatment. The defendants, claiming surprise, asked a postponement of the case in order to produce witnesses as to the doctor's character, which was refused and objection taken. Subsequently when the bill of exceptions was presented to the court on the subject, it directed attention to the fact that the bill embodied not only the objection as made but also referred to a later period in the trial when the plaintiff was testifying on her own behalf and therefore the court said that as no request was made at such later time for a postponement, the objection must be considered as confined to the subject upon which the ruling had been made.

The court instructed a verdict in favor of the International on the ground that there was no proof of its liability. There was a verdict against the Texas & Pacific and after an unavailing effort to obtain a new trial error was prosecuted from the Circuit Court of Appeals, seventeen grounds for reversal being assigned. The judgment was affirmed without a written opinion. This writ of error was then sued out, the assignments of error made for the Circuit Court of Appeals being repeated with an added ground predicated error on the fact that no opinion was written by the Circuit Court of Appeals in affirming the judgment.

After a consideration of all the assignments of error and the arguments advanced to sustain them in the light afforded by an examination of the entire record we are of opinion that there is no ground whatever for holding that reversible error was committed in the trial of the cause, and therefore our duty is to affirm. We might well content ourselves with this statement but we proceed to refer to what we deem to be the more salient of the propositions relied upon in order in the briefest possible way to

point out the reasons why we consider them to be wholly devoid of merit.

(a) In so far as any or all of the contentions, as one or more of them ultimately do, rest upon the proposition that the case should have been taken from the jury because there was no proof tending to show a right to recover, we think they are wholly devoid of merit and it is unnecessary to review the tendencies of the proof to point out the reasons which lead us to this conclusion. *Seaboard Air Line Ry. v. Padgett*, decided March 22, 1915, 236 U. S. 668.

(b) Without intimating in any degree that the contention as to want of jurisdiction was well founded on its merits, we think the correctness of the action of the court in overruling it is so manifestly clear from the statement which we have reproduced made by the court in signing the bill of exceptions and from a consideration of the state of the record which we have recapitulated that no further reference to the subject need be made.

(c) The action of the court complained of in excluding two jurors as a result of their preliminary examination and in refusing to permit a postponement of the case under the circumstances disclosed, it is elementary, involved matters within the sound discretion of the court concerning which the record discloses no semblance of ground for predicated a contention that the limits of sound discretion were transcended.

(d) The various contentions concerning the alleged want of liability on the part of the defendant as the result of any asserted malpractice on the part of the surgeon or surgeons who operated upon the plaintiff, we are of opinion, are likewise devoid of all merit. The correctness of this conclusion is adequately demonstrated by a consideration of the text of the charge given by the court to the jury on the subject. In substance the charge with clearness of statement excluded all liability on the part

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of the defendant for any injury resulting from the intervening malpractice of the surgeon or surgeons, if such malpractice was found to exist, if the plaintiff had failed to exercise reasonable care in the selection of a competent surgeon or surgeons and had in any respect fallen below the standard which reasonable prudence would have exacted, not only in the employment of a reasonably competent surgeon but in following his advice concerning the necessity of the operation to relieve from the consequences of the injury suffered from the collision, if in fact such injury was found to have been suffered.

In conclusion we observe that the contention that error was committed by the trial court in not directing a remittitur because of the assumed excessive amount of the verdict is not open (*Southern Ry. Co. v. Bennett*, 233 U. S. 80), and it needs nothing but statement of the proposition to demonstrate the want of all foundation for the contention that there is ground for reversing the trial court because the court below affirmed the action of that court without opinion.

*Affirmed.*